United States Court of Appeals

for the Second Circuit

SUPPLEMENTAL APPENDIX

B
Pls

76-4054

United States Court of Appeals

FOR THE SECOND CIRCUIT

RCA GLOBAL COMMUNICATIONS, INC.,

Petitioner,

—against—

FEDERAL COMMUNICATIONS COMMISSION
and UNITED STATES OF AMERICA,

Respondents,

and

ITT WORLD COMMUNICATIONS, INC.,
TRT TELECOMMUNICATIONS CORPORATION
and WESTERN UNION INTERNATIONAL, INC.,

Intervenors.

PETITION FOR REVIEW OF REPORT OPINION AND ORDERS
OF THE FEDERAL COMMUNICATIONS COMMISSION

SUPPLEMENTAL JOINT APPENDIX

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TABLE OF CONTENTS*

		Page
1.	RCA Global Communications, Inc. v. Federal Communications Commission and ITT, TRT, 559 F.2d 881 (2d Cir.), decided July 27, 1977	935
2.	RCA Global Communications, Inc. v. Federal Communications Commission and ITT, TRT, 563 F.2d 1 (2d Cir.), decided October 5, 1977	946
3.	Memorandum Opinion and Order of FCC released January 6, 1978	949
4.	FCC Request for Comments from the IRCs, dated October 7, 1977	972
5.	Comments of RCA Globcom, dated November 7, 1977	974
6.	Comments of Western Union International, Inc., dated November 7, 1977	1009
7.	Comments of ITT World Communications Inc., dated November 7, 1977	1023
8.	Comments of TRT Telecommunications Corporation, dated November 7, 1977	1056
9.	Comments of The Western Union Telegraph Company, dated November 7, 1977	1118

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* The pages of this Supplemental Joint Appendix are paginated in the same series as the pages of the original Joint Appendix which was filed with Petitioner's brief of October 1976 and which remains before the Court. Pages 1-934 appear in the earlier volume, pages 935-1147 in this volume.

Page

11. International Quota Bureau Statistics, Recap All Destinations, dated January-June 1977* 1119

11. Report, Order and Notice of Proposed Rulemaking of FCC released January 7, 1976** 1121

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* We are reproducing in this volume the transmittal sheet and the summary page of The International Quota Bureau's report dated September 20, 1977 on outbound telegram traffic for the first six months of 1977. The entire report, all of which was part of the record before the Commission, includes 183 additional pages showing the distributions, by country, to 183 overseas jurisdictions from Afghanistan to Zambia.

** We here reproduce, for the Court's convenience, the FCC's Report, Order, and Notice of Proposed Rulemaking, released January 7, 1976, which occasioned the Petition for Review in this Docket. This FCC decision also appears in the original Court Appendix at pages 1-44.

Electric Corp., 325 F.2d 822, 828–829 (2d Cir. 1963) (Friendly, J., dissenting), *cert. denied*, 376 U.S. 944, 84 S.Ct. 800, 11 L.Ed.2d 767 (1964). The rulings do require that separate nursing homes and individuals must establish for themselves irreparable harm to qualify for preliminary injunctive relief. This is not to say that two or more claimants may not form an appropriate subclass pursuant to Fed.R.Civ.P. 23(c)(4).

Congress provided for interlocutory appeals from the orders specified in § 1292(a)(1) "to permit litigants to effectually challenge interlocutory orders of serious, perhaps irreparable, consequence." *Baltimore Contractors, Inc. v. Bodinger, supra*, 348 U.S. at 181, 75 S.Ct. at 252. Fed.R.Civ.P. 23(c)(4) permits the maintenance of a class action with respect to particular issues when "appropriate." The district court's order only established that class action status as to the preliminary injunction motion was not appropriate although maintenance of both suits as class actions with respect to the remaining issues might be entirely proper. Although the denial of class based preliminary injunctive relief delays the grant of such relief as a result of the necessary individual hearings, it does not, however, produce the type of irreparable consequences that were meant to be encompassed within the interlocutory orders appealable under § 1292(a)(1).

Furthermore, the district court's rulings were founded upon the factors established by Fed.R.Civ.P. 23 for the determination of the appropriateness of class based relief. As such, the orders only prescribe the nature and course that the hearings on plaintiffs' motions for preliminary injunctions will take in the district court and are not appealable under § 1292(a)(1). *See, Switzerland Cheese Association, Inc. v. E. Horne's Market, Inc.*, 385 U.S. 23, 25, 87 S.Ct. 193, 17 L.Ed.2d 23 (1966); *Williams v. Mumford*, 167 U.S.App.D.C. 125, 511 F.2d 363, 370 (1975), *cert. denied*, 423 U.S. 828, 96 S.Ct. 47, 46 L.Ed.2d 46 (1975).

Appeals dismissed.

RCA GLOBAL COMMUNICATIONS, INC., Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION and United States of America, Respondents,

and

ITT World Communications Inc., TRT Telecommunications Corporation and Western Union International, Inc., Intervenors.

No. 522, Docket 76–4054.

United States Court of Appeals, Second Circuit.

Argued Dec. 3, 1976.

Decided July 27, 1977.

Proceeding was instituted on petition to review a report and order and notice of proposed rule making by the Federal Communications Commission. The Court of Appeals, Moore, Circuit Judge, held that: (1) "full hearing" requirement of Communications Act was satisfied by a "notice and comment" procedure stretching over three years, aided by a lengthy statistical study, and with many written submissions by each of the immediately interested parties, but (2) issue whether interim formula which distributed unrouted telegraph traffic among international record carriers in the same proportions as each carrier handled routed traffic was "in the public interest" could not, considering unresolved questions with respect to possible operational, economic and legal implications, be determined on review without a remand of case to Federal Communications Commission for an explanation of methods by which, and purposes for which, it chose to act, as well as an assessment of consequences of order in view of character and future development of industry.

Order vacated and case remanded.

Feinberg, Circuit Judge, concurred and filed opinion.

1. Administrative Law and Procedure ⇐472

In absence of a specific statutory directive as to requisite form of a hearing in an administrative proceeding, emphasis should be placed on requirements of particular case, not on formalistic interpretations of statutory words, and not on equally formalistic and often circular distinction between adjudication and rule making.

2. Telecommunications ⇐73

Type of hearing required by provision of Communications Act that the Federal Communications Commission shall after a "full hearing" prescribe the distribution of such telegraphic traffic as will be just, reasonable, equitable, and in the public interest depends on the facts of the particular case and not on a formalistic interpretation of the statutory words or on an equally formalistic and often circular distinction between adjudication and rule making. Communications Act of 1934, § 222(e)(3), 47 U.S.C.A. § 222(e)(3).

See publication Words and Phrases for other judicial constructions and definitions.

3. Telecommunications ⇐73

In a proceeding before Federal Communications Commission to change prospectively a formula for distribution of telegraph traffic, a change which will affect many parties, and which is based on complicated economic considerations, particularly susceptible to documentary proof, "full hearing" required by Communications Act is satisfied by a "notice and comment" procedure stretching over three years, aided by a lengthy statistical study, and with many written submissions by each of the immediately interested parties. Communications Act of 1934, § 222(e)(3), 47 U.S.C.A. § 222(e)(3).

4. Telecommunications ⇐73

Form of hearing into reasonableness of formula for insuring a fair distribution of unrouted international telegraph traffic did not exempt Federal Communications Commission from burden of making findings that interim formula proposed by it was just, reasonable, equitable, and "in the public interest." Communications Act of 1934, § 222(e)(3), 47 U.S.C.A. § 222(e)(3).

5. Telecommunications ⇐14

Responsibility of a court reviewing an order of the Federal Communications Commission is not to supplant the Commission's balance of interests with one more nearly to its liking, but instead to assure itself that the Commission has given reasoned consideration to each of the pertinent factors.

6. Telecommunications ⇐11

Judicial review of an order of the Federal Communications Commission will function accurately and efficaciously only if the Commission indicates fully and carefully the methods by which, and the purposes for which, it has chosen to act, as well as its assessment of the consequences of its orders for the character and future development of the industry.

7. Telecommunications ⇐73

Fact that order of Federal Communications Commission in respect to reasonableness of formula for insuring a fair distribution of unrouted international telegraph traffic was an "interim" one did not put it in category of an experimental one so that its effect on the public and whether it was "in the public interest" could be judged in the light of the facts resulting therefrom. Communications Act of 1934, § 222(e)(3), 47 U.S.C.A. § 222(e)(3).

8. Telecommunications ⇐73

Issue whether interim formula which distributed unrouted telegraph traffic among international record carriers in the same proportions as each carrier handled routed traffic was "in the public interest" could not, considering unresolved questions with respect to possible operational, economic and legal implications, be determined on review without a remand of case to Federal Communications Commission for an explanation of methods by which, and pur-

poses for which, it chose to act, as well as an assessment of consequences of order in view of character and future development of industry. Communications Act of 1934, § 222(e)(3), 47 U.S.C.A. § 222(e)(3).

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Before MOORE, FEINBERG and GURFEIN, Circuit Judges.

MOORE, Circuit Judge:

Petitioner, RCA Global Communications, Inc. ("RCA") by its petition seeks to review and set aside, in part, a "Report and Order and Notice of Proposed Rulemaking" issued on January 7, 1976 by the Federal Communications Commission (the "Commission" or "FCC") which, in substance, purported to strike down a formula (sometimes referred to as the "international formula") which had been created in, and utilized since, 1943 when such a formula was deemed necessary to insure a fair distribution of unrouted international telegraph traffic and thus avoid possible monopoly power in the Western Union Telegraph Company ("WU") as a result of its merger with Postal Telegraph Cable Company ("Postal"). To make this merger possible, Congress added Section 222 to the Communications Act ("the Act"), 47 U.S.C. § 151 *et seq.*

Supplemental to the Order of January 7, 1976 is a Memorandum Opinion and Order issued on September 27, 1976 and based upon petitions (1) by RCA for a stay pending review of the January 7, 1976 Order by this court; (2) by Western Union International, Inc. ("WUI"); (3) by WU for an extension of time; and (4) by WU for clarification.

Two paragraphs of Section 222 are pertinent to the issues before us. Paragraph (e)(1) provides that Western Union

". . . distribute among the international telegraph carriers, telegraph traffic by wire or radio destined to points without the continental United States, and divide the charges for such traffic, in accordance with such just, reasonable, and equitable formula in the public interest as the interested carriers shall agree upon and the Commission shall approve . . ."

Pursuant to this directive the international formula was evolved. Any modification of this formula was to be as provided in paragraph (e)(3):

"(3) Whenever, *upon a complaint* or upon its own initiative, *and after a full hearing, the Commission finds* that any such distribution of telegraph traffic among telegraph carriers, or any such division of charges for such traffic, which is being made or which is proposed to be made, *is or will be unjust, unreasonable, or inequitable, or not in the public interest*, the Commission shall by order prescribe the distribution of such telegraphic

traffic, or the division of charges therefor, *which will be just, reasonable, equitable, and in the public interest*, and will be, so far as is consistent with the public interest, in accordance with the existing contractual rights of the carriers." (Emphasis added).

Congress thus specified a distribution formula with Commission approval as a premerger condition. Its purpose was to "prevent WU from favoring itself" in the routing of messages. The parties were to agree upon a formula, if possible. After an agreement had been reached it was submitted to the Commission for review. Upon review, the Commission modified the formula in certain respects. For this reason the Commission regarded the formula as "prescribed" by it rather than merely "approved". Joint Appendix ("JA") 4, n.5. This formula without major changes or modifications had remained in effect for some thirty-three years. The object of the formula was, "by freezing the carriers' premerger positions" and by setting up quotas, to create an equitable situation among the international record carriers ("IRCs"), namely, those companies carrying messages overseas in contrast to WU's domestic service.

WU is the only domestic carrier which receives messages from the public. The messages fall into two categories: (1) "routed" wherein the customer specifies a particular IRC which he wishes to transmit his message overseas; and (2) "unrouted" wherein the particular IRC is not designated.

Congress, as part of the merger legislation, specifically provided with respect to "distribution of telegraph traffic among telegraph carriers or any division of charges therefor" that if, after a full hearing, the Commission finds that either of them

". . . is or will be unjust, unreasonable, or inequitable, or not in the public interest, the Commission shall by order prescribe the distribution of such telegraphic traffic, or the division of charges therefor, which will be just, reasonable, equitable and in the public interest . . . ." 47 U.S.C. § 222(e)(3).

Initiation of any such proceeding was to be "upon a complaint or upon its [the Commission's] own initiative."

This proceeding's ancient history is irrelevant except for the brief comment that by a complaint dated November 25, 1964 ITT World Communications, Inc. ("ITT") (also an IRC) sought a revision of the formula. Thereafter and through 1965 various IRCs submitted statements and comments thereto, including parties (intervenors) to this appeal, WUI (a company formed to handle overseas messages because of the requirement that WU divest itself of its cable operations) and TRT Telecommunications Corporation ("TRT").

For all practical purposes, the proceeding remained dormant until November 1973 when the Commission issued an order[1] instituting an investigation to determine whether the distribution of telegraph traffic handled by WU was within the statutory language of unjust, unreasonable, etc., and if so, what the Commission should do about it. In addition to ITT, RCA, WUI, TRT and WU, The French Telegraph Cable Co., Canadian National Railway Co., Canadian Pacific, Ltd., and United States-Liberia Radio Corporation were made parties respondent. A timetable was set up for the filing of statements of fact, memoranda of law, responses and replies.

This the respondents, RCA, ITT, WUI and TRT, did in great volume. (JA 169–672). There were statements of position, replies to each others, comments, supplemental comments and further replies thereto. Throughout RCA demanded an oral hearing to develop facts, albeit on many occasions RCA presented by memoranda and/or affidavits its views. The record before us discloses at least thirty-three separate statements arguing the parties' respective causes. Out of this impressive array of fact and argument came a final decision by the Commission released on January 7, 1976 supplemented by a decision released on September 27, 1976.

1. 43 F.C.C.2d 1174 (1973).

For present appellate review purposes this mass of material can be distilled down to the two points which RCA urges as entitling it to have the Commission's order of January 7, 1976 vacated and set aside and the case remanded to the Commission for appropriate further proceedings, namely, that "The Commission's 'Notice-and-Comment' Procedure Did Not Afford RCA [Globcom] the 'Full Hearing' to Which Section 222(e)(3) Entitled It", and "The Commission's Prescription of a New Interim Formula Is Not Supported by Adequate Findings". As a corollary, RCA claims that such findings as are purported to have been made are arbitrary, capricious and unsupported by substantial evidence.

A "full hearing" with its ultimate purpose of developing the facts dispositive of the issues before the adjudicating agency does not necessarily require that such facts be adduced by question and answer interrogation of witnesses giving oral testimony. Such procedure (in many situations possibly old-fashioned) often resulted in thousands of pages of transcript which when analyzed could have been condensed into a comparatively brief narrative. The fairness of the "hearing" depends not only upon the opportunity to answer the facts so adduced, but also to present the adversary's own factual version. The many statements and counter-statements, previously referred to, evidence the extent of the opportunities afforded the parties to present their factual and legal views. Only a few somewhat more specific comments are required.

I.

RCA asserts that it was deprived of the "full hearing" to which it was entitled by § 222(e)(3) of the Act, 47 U.S.C. § 222(e)(3). It insists that a "full hearing" must consist of a "trial-type" proceeding, with an oral presentation of evidence. With this interpretation of the requirements of § 222(e)(3), we disagree and hold that RCA received the "full hearing" to which it was entitled.

Congress' precise intent in requiring a "full hearing" in § 222(e)(3) of the Act cannot be determined. The statute itself does not contain any further description of the procedures required, and there is no adequate legislative history to aid in clarifying the meaning of the words. The Act was enacted prior to the Administrative Procedure Act and thus the intended meaning of the terms in the prior statute cannot be determined by reference to the later statute, with its detailed descriptions of various levels of "hearings".

RCA contends that the Commission has continually interpreted § 222(e)(3) as requiring a "trial-type" hearing. We need not decide whether the Commission has indeed established such a pattern of interpretation, because such a prior practice would in any case not be dispositive. In interpreting the phrase "opportunity for a hearing" in § 201 of the Act, the Third Circuit stated:

> "While we recognize that the Commission has previously extolled the utilization of adjudicative hearings in § 201 proceedings, we do not believe that this 'prior practice' is as significant as is claimed by AT&T. . . . In the absence of a statutory mandate, we see no reason to bind the Commission to this procedural policy. As technology develops and the field of communications changes, procedural, as well as substantive, policy must be flexible. The mere fact that an agency has once regarded evidentiary hearings as appropriate does not bar it from adopting another policy when changing or new circumstances require a different approach."

Bell Telephone Company of Pennsylvania v. FCC, 503 F.2d 1250, 1264–65 (3rd Cir. 1974), *cert. denied*, 422 U.S. 1026, 95 S.Ct. 2620, 45 L.Ed.2d 684 (1975) (footnote omitted).

The court in *Bell Telephone* went on to hold that in the absence of a clear statutory directive, it would not create a *per se* rule that an evidentiary hearing was required in § 201 proceedings. The facts of each case would determine the type of hearing required.[2] The spread of this flexible ap-

2. The Court noted that a *per se* rule was particularly inappropriate in the case of the FCC:

> "[P]rocedural flexibility can aid the FCC in making the substantive determinations that it

proach to the interpretation of the term "hearing" in regulatory statutes is an outgrowth, to a large extent, of the Supreme Court decision in *United States v. Florida East Coast Ry. Co.*, 410 U.S. 224, 93 S.Ct. 810, 35 L.Ed.2d 223 (1973). The narrow holding of that case was that the words "after hearing" in the Interstate Commerce Act § 1(14)(a) do not require trial-type proceedings. Judge Friendly of this Court has described the import of the *Florida East Coast* decision as follows:

> "The opinion seems to say that 'hearing' provisions in regulatory statutes, which had long been regarded as requiring trial-type hearings, have been modified by the Administrative Procedure Act so that nothing more than notice and written comment is required if the action falls within the APA's expansive definition of rulemaking, and implicitly, of course, that this comports with due process. The definition of rulemaking is exceedingly broad, about the only limitation being that a rule can have only future effect."

H. Friendly, "*Some Kind of Hearing*", 123 U.Pa.L.Rev. 1267, 1307 (1975) (footnotes omitted).

[1, 2] The emphasis, today, in the absence of a specific statutory directive as to the requisite form of hearing, is on the requirements of the particular case, not on formalistic interpretations of statutory words, and not on the equally formalistic and often circular distinction between adjudication and rulemaking. With this in mind, we turn to the facts of the case before us to determine whether the hearing to which the parties were entitled was any different than the one they received.

The Commission had set out in detail the issues to be studied and ordered the parties to file statements of fact and memoranda of law.[3] The International Formula Committee ("IFC") and the International Quota Bureau ("IQB") were made parties for the purpose of furnishing information in their possession required by the Commission. The Commission stated further that after reviewing the written submissions, it would consider the necessity or desirability of an oral hearing, upon its own or any party's motion.

Prior to the submission of the statements and memoranda, RCA sent the Commission a letter, dated March 11, 1974, informing the Commission of the inadequacy of the IQB's data. RCA asserted:

> "It is now evident that there are no 'facts' on which a decision could be based and accordingly either the parties to the proceeding must determine and agree to the facts on an informal basis outside of the hearing process or, absent the agreement of the parties, an oral evidentiary hearing must be held."

In order to facilitate an informal determination of the facts, RCA informed the Commission that the parties had agreed to share the costs of a statistical study to be conducted by WU. Accordingly, on May 30, 1974, the Commission ordered that this study be conducted.

The Western Union Study was published on June 12, 1975, and on June 16, the IQB issued a summary of the study. After consideration of the study, the parties submitted supplemental comments on August 1, 1975. On August 28, the parties submitted their fifth and final round of responsive comments.

In each of five submissions, RCA devoted one sentence to asserting its right to an oral hearing. It did not give any specific reasons for the necessity of an oral hearing, any necessity for cross-examination, any importance of witness credibility, or any evidence that could only be presented orally. In fact, in its August 1, 1975 submission, it stated that "using the Western Union derived data, [it was able] to compile an

is required to make under the Communications Act. To lock the FCC into one type of proceeding—be it evidentiary or otherwise—could jeopardize the ability of the Commission to determine the 'public interest' in a given case."

503 F.2d at 1265.

3. *See also* 47 F.C.C.2d 225 (1974).

accurate summary of the effects of the ITT and TRT proposal on RCA Globcom." (JA 510) (emphasis added).

[3] Accordingly, we hold that in a proceeding to change prospectively a formula for the distribution of telegraph traffic, a change which will affect many parties, and which is based on complicated economic considerations, particularly susceptible to documentary proof, the requirement of a "full hearing" is satisfied by a "notice and comment" procedure stretching over three years, aided by a lengthy statistical study, and with many written submissions by each of the immediately interested parties.

II.

[4] However, the form of the hearing does not exempt the Commission from the burden of making findings that its interim formula will be just, reasonable, equitable, *and in the public interest*". (Emphasis added). "Interim" is defined as "temporary" or "provisional".[4] Obviously anything on an interim basis looks to something more permanent. That "something" is readily discernible from the Commission's order reflecting its belief that anyone who desires to send a transoceanic telegram *must* specify at the time of delivering the message to be transmitted, the particular carrier (the IRC) by which he or she desires the message sent. This objective is gleaned from such statements as the Commission expects "the parties during this [the interim] period to work out mutually-agreeable procedures for implementation of the all-routed distribution systems so that we can avoid later controversy on this point." (JA 27). The Commission concedes that it cannot move immediately to require customer routing (JA 3) but it agrees "in principle that we should proceed in this new direction". (JA 27) The "interim" period, so states the Commission, is to be used so "that the IRCs will use this period to expand their solicitation efforts, so that the customer routing system will work smoothly and efficiently". (JA 28).

The Commission's determination to abolish the customer's right to merely hand in his message for transmission is clear from its statements that "[i]n place of the present formula, we will place distribution of traffic on the choice of the customer", i. e., "routed" messages, and that in the interim it prescribes "a new formula which distributes unrouted traffic among the IRCs in the same proportions as each carrier handles routed traffic". (JA 3).

The record discloses that in 1974[5] some three million messages were "unrouted" and that of the 3.9 million messages handled by WU, 76.5% were unrouted and 23.5% routed. Thus, as the Commission recognizes, "unrouted traffic continues to represent a substantial portion of outbound traffic and the equitable division is a matter of consequence to the IRCs". (JA 11).

Under the heading "II. Findings: The Present Formula", the Commission has set forth figures which show a substantial disparity in unrouted messages handled by ITT, TRT, WUI and RCA. This disparity arises in the Commission's opinion because the original formula "sought to keep market shares static" in order to achieve a balance between carriers. But for this disparity the Commission states that "[it] cannot ignore the possibility that quality of service could have been improved absent the inequities of the formula" (JA 17) and upon this assumption the Commission concludes that these distortions "are injurious to the public interest and should be eliminated". (JA 17).

The Commission concedes that "the parties were not [on] notice that [it] would consider a requirement for specific routings"; that the parties hereto have not "addressed the legal or economic issues raised thereby"; and that it is "unable at this point to determine the extent of the economic burden which would result from a requirement for specified routings". Nevertheless "[it] agree[s] in principle that

4. Webster's New World Dictionary of the American Language, College Edition (1968).

5. 1974 was the year of the WU study.

[it] should proceed in this direction [namely, 'customers be required to specify the routings']". (JA 27).

The Commission recognized that the 1974 study "indicates that a large number of customers either do not care to route their messages or that they are not familiar with the different IRCs, since three-fourths of WU transfers are unrouted". (JA 27). It admits that "until IRC advertising can become effective, WU employees will be required to provide users with this information", which "may place a substantial burden on WU". (JA 27).

The Commission states that "[n]one of the parties considered the increase in WU's costs which would follow from this expanded role, or the effect of that increase on the users of both domestic and international service". (JA 27). The Commission admits that "instructions and operational arrangements . . . are needed to guide WU in presenting the public a mandatory choice among IRCs" but that "[t]he information now before us [the Commission], however, is insufficient to prescribe those instructions or operating arrangements." (JA 28).

In repealing the original formula directed by Congress to be achieved by agreement among the carriers and approved by the Commission, the Commission "concluded that the public interest . . . will be best served by relying primarily on consumer choice [i. e., routing] for the distribution of traffic among the several international record carriers", but that "[d]ue to certain unresolved questions concerning possible operational, economic and legal implications, [it] will not prescribe that all international telegraph traffic must be specifically routed by the customer". The Commission states that it expects "a more aggressive marketing effort and a consequential reduction in unrouted traffic". Finally, despite protestations that its interim formula is designed to serve the public interest, the Commission solicits "prompt comments concerning the operational, economic, and legal implications of an all-routed distribution in order [to] reach an early decision concerning whether the public interest would be served even better through this means". (JA 35).

Under the interim formula, unrouted messages are to be distributed so that each IRC will receive a volume of such messages which will equal its quota as defined in the formula. The parties were directed to file comments on or before March 26, 1976 with replies by April 23, 1976. The parties, RCA, ITT, TRT and WU were almost unanimous [6] in their comments that an all-routed plan would greatly increase costs, delay efficient service and result in confusion to the members of the public who desired to send telegrams. Particularly stressed is the thought that any such scheme would be highly adverse to the public interest. The views of WU are entitled to particular consideration because it is the originating source of all foreign-bound telegrams in the 50 states. It alone has the initial contact with the customer, namely, the telegram sender. If the all-routed plan contemplated by the Commission is required, the statute requires investigation as to whether it would be "in the public interest". Using the figures of 3 million unrouted messages a year and the assumption based upon comments of the parties that these messages are largely of a social nature and are not sent by any individual more than once or twice a year, well over one million customers would be involved. These messages would all have to be delivered to WU either across the counter by hand or by telephone. If the Commission's plan were to go into effect, the WU operator would have to inquire by what IRC the customer wished the message to be sent. Undoubtedly the customer would not have any idea what these initials stood for so that the operator would have to advise him that they referred to the carrier which transmitted the message abroad. The customer would, in all likelihood, say that he did not care so long as the message was delivered promptly. The operator would then have to inform the customer that he could not take the message unless the customer specified an IRC. This would

6. WUI, hoping to capitalize on its name similarity to WU, took a different position.

require informing the customer as to the various IRCs and supplying him with material describing the merits of each. Were the customer to seek the operator's recommendations, this would put into the hands of WU the power to select and specify. The problems (even the absurdities) attendant to this situation have been well described in WUI's comments of May 10, 1976, wherein it said:

> "To ensure that the public makes an informed choice, WUI suggests that each member of the public submitting a message that has not been pre-routed be given a brief pamphlet containing descriptions of the available carriers. This pamphlet could contain six sections, one containing a brief description of the WUTelCo/IRC relationship and the requirement of routing, and one section for each of the five interested carriers, with a description or advertisement written by the carrier concerned." (JA 905).

By such a method WUI states that the customer could "easily and simply be informed". This simple method would require the customer, anxious to have his message immediately transmitted, to read a short history of the WU–IRC relationship, assuming that it could be condensed into a few pages, then read the advertising literature written by each of the other IRCs and after serious cogitation consider which of the IRCs seemed to be the best. Assuming that this could be done in a convenient reading area within an hour, query, would the customer be any better informed? The average customer would be entitled to say in a petulant and indignant way that he came to send a telegram and not to be forced to absorb a history of the transoceanic telegraph industry. Nor would he care whether his message went through the air by cable under the sea, or bounced off a satellite in outer space.

The Commission has also suggested that the IRCs could inform the public by an intensive advertising campaign of their respective merits. Assuming that it were possible to reach every village and hamlet of the nation by radio, television, newspaper advertising or otherwise, any such program would be quite costly. WU has given a figure of approximately two million dollars. This would add materially to the cost of the messages and be a burden instead of a benefit to the public. Furthermore, in their comments, the IRCs have indicated that such an effort would not be worthwhile economically and that they would be unwilling to spend substantial sums in an attempt to induce potential customers to use their own companies. This phase of an all-routed program has not as yet been considered by the Commission or made the subject of any findings of fact.

Assuming, as we do, that the notice-and-comment procedure is acceptable, there seems to be in the record no comment from the public or anyone who might speak in its behalf on the vital element in the statute, *i. e.*, "public interest". Nor is there any factual showing that the service being rendered is not of the highest quality or that it could be improved by an all-routed scheme. To the contrary, high quality of service is conceded and there is no showing that the carriers have not availed themselves of the most modern technological devices.

The Commission has professed to be acting "to regulate [the carriers] in the public interest" and states that the public is interested "in a rapid, efficient communications service with adequate facilities and reasonable charges" (JA 75) but nowhere in the record is there any proof, much less a finding, that the public is not receiving such service. As to reasonable charges, the statements in the record are that as a result of the Commission's decree the public may be forced to bear higher charges.

Another possible adverse consequence of its decree, which the Commission itself raises, is whether the decree calling for "redistribution of traffic will unreasonably endanger the financial integrity of the carriers to the point that they are unable to adequately serve the public". (JA 75). The Commission recognizes that "[w]ith respect to ITT, TRT and FTC, the interim formula will likely result initially in their receiving increased unrouted traffic and increased

revenues . . . [which would] improve their financial position" and that "[w]ith respect to RCA and WUI, the interim formula does appear likely initially to reduce their message volumes and revenues". (JA 75). The Commission estimates that the projected diversion of revenues is only 6.3% of RCA's net income[7] and that this loss "would not so reduce RCA's revenues as to put it into a loss situation or otherwise damage its ability to serve the public. . . ." (JA 75–76).

[5, 6] We find ourselves stymied in attempting to review the adequacy of the above findings of the Commission. Looking to applicable law and precedent, we find two principles well established: first, a reviewing "court's responsibility is not to supplant the Commission's balance of . . . interests with one more nearly to its liking, but instead to assure itself that the Commission has given reasoned consideration to each of the pertinent factors"; and second, "[j]udicial review of the Commission's orders will therefore function accurately and efficaciously *only* if the Commission indicates fully and carefully the methods by which, and the purposes for which, it has chosen to act, as well as its assessment of the consequences of its orders for the character and future development of the industry". *Permian Basin Area Rate Cases*, 390 U.S. 747, 792, 88 S.Ct. 1344, 1373, 20 L.Ed.2d 312 (1968) (emphasis added).

In *Hawaiian Telephone Company v. F.C.C.*, 162 U.S.App.D.C. 229, 498 F.2d 771 (1974), the court said:

> "While the Commission need not make 'specific findings of tangible benefit' it must go beyond its bare assertion of benefit. It must provide the basic facts which lead it to reach its conclusion of public benefit from the decision. If such basic facts have not been developed in the prior agency proceedings and record, then hearings or supplemental inquiry may be necessary.
>
> "Following the Supreme Court in [*F.C.C. v. RCA Communications, Inc.*, 346 U.S. 86, 73 S.Ct. 998, 97 L.Ed. 1470 (1953)] and other decisions, this court has long required that agencies present sufficient support for their conclusions in order that the court can properly review their decision. The court, and the parties, must not be left with *post hoc* rationalizations by counsel as the prime authority for the Commission decision." 498 F.2d at 777–78 (footnotes omitted)

In *F.C.C. v. RCA Communications, Inc.*, 346 U.S. 86, 73 S.Ct. 998, 97 L.Ed. 1470 (1953), the Commission had authorized a competitor of RCA to open two new circuits to two European countries. RCA urged that this grant would constitute unnecessary duplicate competition. The Supreme Court (Mr. Justice Frankfurter), although recognizing that "the Commission is not required to make specific findings of tangible benefit" 346 U.S. at 96, 73 S.Ct. at 1005, said that "it is not too much to ask that there be ground for reasonable expectation that competition may have some beneficial effect". 346 U.S. at 97, 73 S.Ct. at 1005. Further, in referring to the Commission's statement that " 'Competition can generally be expected to provide a powerful incentive for the rendition of better service at lower cost' ", said: "Surely one cannot conclude from this bare statement that the Commission, whatever undisclosed awareness it may have of the problem, has sufficiently laid bare its mind to enable us to perform our reviewing function". 346 U.S. at 94–95, n.6, 73 S.Ct. at 1004.

[7] The fact that the report and order is an "interim" one does not put it in the category of an experimental one so that its effect on the public and whether it is "in the public interest" may be judged in the light of the facts resulting therefrom. For all practical purposes it has all the earmarks of finality since all the parties are directed now to devote their efforts to forcing the public into an all-routed system.

[8] For these reasons, before the consequences become a *fait accompli*, it would

7. Based on RCA's estimate, accepted by the Commission, (JA 75), this amounts to a loss of $428,000 from outbound traffic and $1,600,000 from inbound traffic.

seem wise to ask the Commission to "present sufficient support for their conclusions in order that the court can properly review their decision", *Hawaiian Telephone Company*, 498 F.2d at 777, and "[t]o gather the information [the Commission] need[s] for decision". (JA 28). And since the focal points of the report and order are public interest and the "unresolved questions concerning possible operational, economic and legal implications" (JA 35), it would seem advisable at this time to remand the case to the Commission to enable it to carry out its stated purpose and to indicate "fully and carefully the methods by which, and the purposes for which, it has chosen to act, as well as its assessment of the consequences of its orders for the character and future development of the industry." *Permian Basin Area Rate Cases*, 390 U.S. at 792, 88 S.Ct. at 1373. Such a remand would appear to be not inconsistent with the Commission's views because at the end of its report and order it stated:

> "Meanwhile, we are soliciting prompt comments concerning the operational, economic, and legal implications of an all-routed distribution in order that we may reach an early decision concerning whether the public interest would be served even better through this means." (JA 35).

Since the Commission has ahead of it further fact investigation along lines which would appear to be foundation stones, on which even an interim order should rest, it is not inappropriate for the Commission to develop and state the facts attendant to these vital "implications of an all-routed distribution." When its "early decision" is reached, then and only then can a reviewing court know whether there is solid factual support in the record.

It may very well be that the 1943 formula after the passage of over thirty years should be revised or modified. It may even be possible that the Commission has the power to enlarge by its own *fiat* the share of unrouted messages to which ITT and TRT are entitled. However, any such result should be based upon proof addressed to this subject (and on notice thereof) and such proof should be reflected in the form of specific findings pertaining thereto which we do not find to be present in the January 7 and September 27, 1976 reports and orders. For these reasons we believe that this proceeding should be remanded to the Commission for further findings which will reflect the basis for the many conclusions stated in the reports and orders, but which we find unsupported by adequate proof. It is also possible that in reconsidering the proper formula for the distribution of international cablegram traffic, the Commission will have the benefit of the additional facilities in aid of such distribution which WU was scheduled to have put in effect by April 1, 1977. (JA 881).

The original balancing scheme of the 1943 formula has as its purpose equalization among the carriers. This equalization may well have become unbalanced over the years, but the solution is to be by a formula "just, reasonable, equitable, *and* in the public interest." (Emphasis supplied). Upon the record before us, public interest seemed to have been ignored except as a phrase used in a conclusory way and not based upon any proof that the public interest will be served by the Commission's new interim plan.

The petition for review is granted, and the Report, Order and Notice of Proposed Rulemaking is vacated. The case is remanded to the Commission for further proceedings in accordance with the above opinion.

FEINBERG, Circuit Judge, concurring:

I join fully in Part I of Judge Moore's opinion and also agree that the FCC's proposed interim formula in this case is not adequately supported by the record before us. See *FCC v. RCA Communications, Inc.*, 346 U.S. 86, 73 S.Ct. 998, 97 L.Ed. 1470 (1953). Therefore, I concur in the decision to remand this case to the FCC for further proceedings.

WEST KEY NUMBER SYSTEM

CC946

RCA GLOBAL COMMUNICATIONS, INC., Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION, and United States of America, Respondents,

and

ITT World Communications Inc., TRT Telecommunications Corporation and Western Union International, Inc., Intervenors.

No. 522, Docket 76-4054.

United States Court of Appeals, Second Circuit.

Argued Dec. 3, 1976.

Decided July 27, 1977.

On Rehearing Oct. 5, 1977.

Petition was filed for rehearing of decision, 559 F.2d 881, remanding to Federal Communications Commission proceeding involving revision of 1943 formula governing distribution, among international record carriers, of unrouted international telegraph traffic. Motion was also filed for issuance of a mandate forthwith. The Court of Appeals, Moore, Circuit Judge, held that: (1) the formula did not create a contract in perpetuity apportioning revenues and did not relieve the FCC of its statutory duty to prescribe a just, reasonable, equitable and "in the public interest" formula and (2) remand was not limited to the record already made.

Petitions for rehearing granted and case remanded for further proceedings and findings; remaining motion denied.

1. Telecommunications ⇐73

Purpose of 1943 formula governing distribution of unrouted international telegraph traffic following consolidation or merger of telegraph carriers was to balance the traffic situation as it then existed so as to avoid a possible monopoly in international telegraph traffic in the only domestic carrier receiving messages from the public; although purpose of the formula was to freeze the shares of industry participation because of the potentially unique situation created by merger, such purpose could not be stretched to give international record carriers a right in perpetuity to a fixed share of the telegraphic market regardless of changes in conditions and circumstances.

2. Telecommunications ⇐73

The 1943 formula for apportioning unrouted international messages amoung telegraph carriers did not create a contract in perpetuity apportioning revenues and did not relieve the Federal Communications Commission of its statutory duty to prescribe a just, reasonable, equitable and in the public interest formula; even assuming that "public interest" was eliminated the FCC was still required to cope with the remaining three requirements in ruling on complaint seeking a revision of the formula.

3. Telecommunications ⇐73

Remand of proceeding seeking revision of 1943 formula governing distribution of unrouted telegraph messages among international record carriers was not limited to the record already made; if the parties desired to submit to the Federal Communications Commission by affidavit and/or written argument any relevant additional facts and arguments they could do so, subject to such scheduling as the FCC might direct.

Before MOORE, FEINBERG and GURFEIN, Circuit Judges.

MOORE, Circuit Judge:

Following this court's decision of July 27, 1977, FCC,[1] ITT and TRT have petitioned (August 10, 1977) for rehearing, ITT and FCC with a suggestion for rehearing *en banc*. The not unusual grounds are assigned, *i. e.*, that we have "misapprehend[ed] basic facts of the case" and that

1. The abbreviations used in the original opinion will be maintained here.

we have "failed completely to recognize the blatantly anti-competitive consequences of the original 1943 international formula". ITT in addition urges that we should limit the remand "to avoid unnecessary and confusing additional proceedings before the agency."

Possibly to spur this court into more rapid action or as an antidote to the rehearing petitions, RCA has made a motion (August 17, 1977) for the issuance of a mandate forthwith. Needless to say, this motion brought forth immediate and strenuous opposition from FCC, ITT and TRT (August 22, 23, 1977).

Since both petitions for rehearing and the motion for immediate mandate issuance present the same issues, namely, in substance, the court's ineptitude in understanding the determinative facts and applicable law, they will be treated together in writing, by way of extenuating circumstances, this apologia.

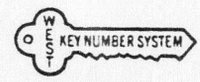
Initially, a few observations about "the public interest" which in a factually-unsupported and conclusory way was so stressed in the FCC opinions. We did not find that the formula [the "interim"] was in, or not in, the public interest. There simply was no proof that related it to the public interest in any way. It may well be that "public interest" is not a necessary factor to be considered in view of the fact that there seems to be no contention that the best-known technological methods of transmission are not being used and that no detriment is being suffered by the public from operations under the old or new formulas. The FCC's statements of possible improvement are wholly suppositious.

[1, 2] In the realm of misunderstandings, just as FCC, ITT and TRT believe that we have misunderstood the Commission's Orders, so we believe that our position, too, has been misunderstood. We do not regard the 1943 formula as "unlawful". Its entire purpose by Congressional edict was to balance the traffic situation as it then existed to avoid a possible WU monopoly. Certainly we can appreciate, just as the FCC, that the world has been spinning at an accelerated speed (undoubtedly a scientific inaccuracy)—in the field of telegraphic communications and for those participating in the industry since 1943. The FCC very properly was entitled to examine the situation in light of the present condition of the industry. Although the purpose of the 1943 formula was to freeze the shares of industry participation because of the potentially unique situation created by the merger, that purpose cannot be stretched to giving RCA a right in perpetuity to a fixed share of the telegraphic market regardless of changing conditions and circumstances. It certainly could not have been the intention of the Congress or the FCC to permit RCA to sit back and do nothing to counteract tactics by its competitors and rely upon the "formula" to give it the lion's share of the unrouted business.

In our Opinion we did emphasize what we felt were many non-sequiturs advanced by the FCC allegedly to support findings "in the public interest". We are concerned primarily with that interest. However, we had no, or do not have any intention "to invalidate the entire result of the FCC's efforts." The FCC Orders would appear to affect the carriers at the present time as to expenses possibly being incurred in preparation for an "all-routed" system. This situation is represented by RCA as resulting "in almost certain increases in costs to the carriers and, ultimately, to the users of the IRC's services, impairment of efficient service, ..." These results we hope the FCC will strive to avoid. RCA also claims that the "interim" formula "has *exposed* RCA Globcom to a revenue loss of $1,500,000". (emphasis added), and accurately defines "this proceeding [as] a dispute over a specific revenue-producing pool of international telegram traffic". But the 1943 formula did not create a contract in perpetuity apportioning revenues and did not relieve the FCC of its statutory duty to prescribe a "just, reasonable, equitable, and in the public interest" formula. Assuming "public interest" is eliminated as not adversely affected, mathematical subtraction still requires the FCC to cope with the

remaining first three requirements. The "interim" formula now has been in effect for some ten months. During this period some facts pertinent to the operation of the interim formula must have become available which would be of aid to the FCC on remand. We, therefore, view with favor the ITT suggestion of a limited remand to determine "whether the promulgation of the 'interim' formula has, in the opinion of the FCC, a factual basis in the record independent of the FCC's tentative preference for an all-routed system." Such a limited remand should not adversely affect either the FCC's further factual investigation of an "all-routed" plan or foreclose the parties from continuing their objections thereto. And possibly the FCC will find a method whereby, by proof, the interest of the telegram-sending public may be ascertained with respect to an all-routed requirement. However, if the FCC should choose to await the results of its anticipated further investigation into this field, there would appear to be no good reason for the threatened possibility of its inclusion in the "interim" plan, thus causing the industry presently to adjust itself to such a basis. Were "all-routed" plans to be eliminated or at least postponed for definitive findings, the division of "unrouted" messages would appear to be the primary issue. With ten months' experience behind them, the parties should be able to submit to the FCC such proof as would bear upon the equities or inequities of the "interim" plan.

[3] Such remand is not to be limited to the record already made and, if the parties desire to submit to the FCC by affidavit and/or written argument additional facts and arguments as are relevant, they may do so, subject, however, to such scheduling as the FCC may direct. Because of the importance of the time element, it is suggested that proof, if any, be submitted to the FCC within thirty (30) days and that the FCC endeavor within sixty (60) days to make such findings of fact and draw such conclusions therefrom as may be warranted so as to enable the court to render its decision. Until then, the "interim" formula may be continued in effect and issuance of the mandate stayed. Motion for immediate issuance of mandate denied. Petitions for rehearing granted and on rehearing, case remanded to FCC for further proceedings and findings. This court, and this panel thereof, will retain jurisdiction of the case pending the proceedings outlined.



BRITISH AIRWAYS BOARD, Petitioner,

v.

CIVIL AERONAUTICS BOARD, Respondent.

No. 814, Docket 76–4226.

United States Court of Appeals, Second Circuit.

Argued April 5, 1977.

Decided Aug. 22, 1977.

A foreign government-owned air carrier petitioned for review of orders of the Civil Aeronautics Board requiring it to file existing schedules and proposed schedules 30 days prior to commencement of service. The Court of Appeals, Oakes, Circuit Judge, held that the orders in question improperly ignored a presidential directive made in the exercise of the President's statutory and constitutional powers.

Order set aside.

1. Aviation ⇐101

Orders of Civil Aeronautics Board requiring foreign government-owned air carrier to file existing schedule and proposed schedules 30 days prior to commencement of service did not have effect of amending foreign carriers permit, and Court of Appeals therefore had jurisdiction to review such orders. Federal Aviation Act of 1958, § 1006, 49 U.S.C.A. § 1486.

Before the
Federal Communications Commission
Washington, D. C. 20554

FCC 77-805
83845

In the Matter of)
)
International Record Carriers' Scope of)
Operations in the Continental United) Docket No. 19660
States, Including Possible Revisions to) RM-690
the Formula Prescribed under Section 222)
of the Communications Act)

MEMORANDUM OPINION AND ORDER

Adopted: November 30, 1977 Released: January 6, 1978

By the Commission: Commissioner Brown not participating.

INTRODUCTION

1. In our Report and Order and Notice of Proposed Rulemaking in Docket No. 19660, 57 FCC 2d 190 (1975), we (1) ruled that the then existing formula prescribed pursuant to Section 222(e)(3) of the Communications Act of 1934, as amended, to govern the distribution of outbound unrouted telegraph messages among the international record carriers (IRCs) was unjust, unreasonable, inequitable and not in the public interest; (2) instituted a proposed rulemaking examining the legal, economic and operational implications of placing traffic distribution on a required customer routing basis; and (3) prescribed an interim formula pending the outcome of the inquiry looking into the all routed system of distribution. RCA Global Communications, Inc. (RCA Globcom) appealed our decision to the United States Court of Appeals for the Second Circuit. On July 27, 1977, the Court issued an opinion vacating our decision and remanding the case for further proceedings consistent with the standards set forth in Section 222(e)(3) of the Communications Act, 47 U.S.C. 222(e)(3). 1/

1/ Section 222(e)(3), 47 U.S.C. 222(e)(3), states that whenever: "the Commission finds that any such distribution of telegraph traffic among telegraph carriers or any such division of charges for such traffic, which is being made or which is proposed to be made, is or will be unjust, unreasonable, or inequitable, or not in the public interest, the Commission shall by order prescribe the distribution of such traffic, or the division of charges therefore, which will be just, reasonable, equitable, and in the public interest, and will be, so far as is consistent with the public interest, in accordance with the existing contractual rights of the carriers."

Thereupon, the Commission, TRT Telecommunications Corporation (TRT), and ITT World Communications, Inc. (ITT Worldcom) requested rehearing. On October 5, 1977, the Court granted the petitions for rehearing and issued a stay of its mandate. See RCA Global Communications, Inc., Case No. 522.

2. In granting the petitions for rehearing the Court remanded the case for further proceedings primarily to examine "whether the promulgation of the interim formula /for distribution of outbound, unrouted international telegram messages among the international record carriers/ has, in the opinion of the FCC, a factual basis in the record independent of the FCC's tentative preference for an all routed system." The court also asked us to determine whether "the interest of the telegram sending public may be ascertained with respect to an all routed requirement."

3. Pursuant to a suggestion from the Court, we invited the parties to the proceeding to file comments on the above issues. Comments have now been filed by RCA Globcom, ITT Worldcom, TRT, Western Union International, Inc. (WUI), and the Western Union Telegraph Company (Western Union). In addition to these pleadings, we have the benefit of statistical reports filed with us and the parties by the International Quota Bureau showing the distribution of outbound international telegraph messages under the interim formula during the period January 1, 1977 to June 30, 1977. Based on the views of the parties, the background of the formula, present circumstances in the international telegraph service, and the facts and statistical records before us, we find that the following actions will serve the public interest: (1) the rulemaking looking toward designating a new formula shall be terminated without prescribing an all routed formula; and (2) the interim formula which allocates to each IRC a portion of unrouted traffic in the ratio it receives customer routed messages will be prescribed on a permanent basis. 2/

ALL ROUTED FORMULA

4. Our review of the comments filed by the parties, and the operating results under the interim formula persuades us that a prescription of the all routed formula is not necessary to achieve our basic public interest objectives and indeed would not be "just, reasonable, equitable and in the public interest." At the time we called for comments on the all routed proposal, we indicated our preference for a system of traffic distribution based completely on customer choice, as a stimulus to greater competition which we believe would better serve the public interest. At paragraph 44 of the Report and Order, we stated, however, that the record then before us was inadequate

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2/ The background of this decision is set forth in our Report and Order and in the Court's decisions.

to adopt the all routed method of distribution. Instead, we prescribed the interim formula for the distribution of international message telegraph traffic until we were in a position to determine whether the all routed method of distribution would in fact result in better service to the public without, inter alia, proving to be an undue economic burden to the carriers.

5. Based on the comments we have received, we do not find sufficient merit in the all routed formula to warrant its prescription. ITT Worldcom, RCA Globcom and TRT oppose prescription of the all routed formula since they believe that the added costs to the carriers and consequently to the public arising from the implementation of or reliance upon the all routed formula would yield no real benefit to the public generally or to those customers -- representing approximately one-third of international message telegraph market -- who do not route and to whom the all routed formula is directed. Likewise, Western Union opposes the all routed formula and concludes that it is uneconomic and, more than likely, unworkable due to the vast number of unrouted messages. Western Union, however, points out that under the interim formula it has recently initiated a system of distributing unrouted traffic among the IRCs on an automated basis and that this system is functioning smoothly. It further states "that the operating expenses required to continue to distribute traffic automatically are relatively minor (approximately $50,000 per year) when compared to the millions of dollars required to implement an all-routed solution." 3/ Since so many users are satisfied to place these messages with Western Union, we do not now believe that an all routed formula would add significant public benefits, whereas it could add to customer costs and even distrupt the convenient service through Western Union to which the public has become accustomed. Accordingly, we will terminate the proceeding without further action with respect to an all routed distribution system.

THE INTERIM FORMULA

6. When we prescribed the interim formula we were confident that it would be a vast improvement over the 1943 formula (although we had hopes that the all routed method would prove to be even better). Appendix A of this decision sets forth the interim formula in its entirety. The formula provides a direct ratio method for distribution by Western Union among the IRCs of outbound international message telegraph traffic. It allocates unrouted traffic among the IRCs in proportion to the share of specifically routed traffic to a particular destination country each IRC receives from its users.

7. Under the interim formula, a carrier is entitled to handle any specifically routed traffic to any destination area for which it has a tariff on file. A message is considered specifically routed if it is filed at a carrier's office by the sender in person, by telephone or other electronic means, or at a Western Union office so long as the particular IRC is designated by the sender and the carrier is authorized to serve the destination point sender.

3/ While making plain that it favors a formula mode of distributing traffic over the all routed approach, Western Union takes no position as to the precise formula to be prescribed or the appropriateness of the interim formula per se.

8. A message is considered unrouted anytime the sender does not specify a carrier. 4/ Each IRC is entitled to receive from Western Union unrouted traffic for each destination point in the carrier's effective outbound message telegraph traffic whether service to the destination is direct or by interconnection. A carrier's quota of unrouted traffic to a destination point is derived from the ratio of the number of routed messages to that point handled by the carrier during the base period to the total number of messages to the destination handled by all the carriers serving that point during the base period. Unassigned traffic is allocated to each carrier without regard to its length or its category in the message telegraph service on a rotational basis.

THE PLEADINGS

9. The primary question the Court has asked us to determine is whether the interim formula may be justified outside of its role as precurser to an all routed allocation formula. At our invitation the parties have filed comments respecting the question of independent justification for the interim formula.

A. Comments by RCA Globcom

10. RCA does not believe that sufficient independent support exists to retain the interim formula. It argues that the interim formula during its year of operation has disserved the public interest by imposing unnecessary costs on the industry and by shifting traffic to less efficient routes. In the first place, according to RCA Globcom, the public interest is affected adversely by the wasteful spending on advertising that is encouraged by the interim formula since its market research shows that in excess of 90 percent of all social traffic and approximately 65 percent of all business traffic transferred to RCA Globcom is unrouted. Following implementation of the interim formula, RCA Globcom doubled its combined advertising and marketing expenditures devoted to international telegram service, from approximately $340,000 in 1976 to approximately $670,000 (annualized in 1977). However, despite its substantial increase in marketing effort, it states that there has been no discernable effect on the volume of unrouted traffic generated by the public. In addition, RCA Globcom states that a minimum nationwide marketing and advertising campaign would require an expenditure of $2,007,000.

11. RCA's second argument concerns inefficient routing of unrouted traffic. It contends that the interim formula has caused a shift of over 50,000 message transfers by Western Union from international carriers with direct international circuits to specified destination points to carriers with only indirect capability to the customer's desired point. This has resulted in less efficient traffic handling, an increased payout of $130,000 by the IRCs to foreign correspondents, and the idling of communications

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4/ Traffic specifically routed to a sender by way of a carrier to a point not tariffed by the carrier is also considered unrouted and is allocated under the formula to a carrier serving that point.

capacity which RCA Globcom has in place. Thus, RCA Globcom points out that this effect of the interim formula is inconsistent with our position in the gateway proceeding where we stated that

> An authorization . . . to provide service . . . on a direct basis rather than an indirect basis . . . should improve efficiency to the extent that traffic no longer must be switched through /a second country's/ switching system and be hauled between /a second country and its ultimate destination/ over landline facilites. International Record Carrier's Communications, 58 FCC 2d 250, 257 (1976).

From this, RCA Globcom concludes that essentially the same considerations mitigate against the use of indirect, less efficient routing as fostered by the interim formula.

12. RCA Globcom also challenges our position that the additional degree of competition the interim formula fosters will serve the public interest. RCA Globcom states that the interim formula creates incentives which encourage the IRCs to seek to increase their share of unrouted traffic, not by pursuing the occasional hinterland customer who does not route, but by intensifying their solicitation efforts to change the routing of large business customers already routing traffic and located in the gateways and in other major metropolitan centers. This emphasis on customers already routing traffic, according to RCA Globcom, arises from the feature of the interim formula which rewards a carrier for every routed message with two or three other messages. RCA Globcom states that this effect is inconsistent with our expressed desire to promote "customer choice" and thus to achieve a consequential reduction in unrouted traffic.

13. In addition to the absence of benefits accruing to the public, RCA Globcom states that the interim formula abruptly and unfairly shifts large blocks of traffic from RCA Globcom to other carriers. RCA Globcom submits that such action can only be justified on a finding that the carrier potentially losing traffic has misused or abused its position, thereby rendering the operation of the formula "unjust, or unreasonable or inequitable or not in the public interest." Likewise RCA Globcom further contends that in virtually all cases in which one carrier or another received, under the prior formula, most of the unrouted traffic to a given area, that carrier occupied its lead position before Section 222 was enacted. Thus, just as its competitors' efforts may have been hampered by the formula so too was the competitive effort of the carrier responsible for transmission of the major portion of traffic. With respect to the effect of the formula on its own operations, RCA Globcom estimates it will "lose approximately 400,000 messages in 1977 and substantial unrecoverable revenues

from the formula change on authorized traffic alone." Finally, RCA expects its total traffic and revenue losses to grow if the interim formula remains operative since it states that "outbound traffic to a major extent affects the amount of inbound traffic carriers receive from overseas."

14. Following its arguments that the interim formula is neither fair to the carriers nor in the public interest, RCA Globcom proposes alternate approaches to revising the formula. It argues that each alternative will minimize or eliminate the detrimental effects it sees arising from the interim formula. First, RCA Globcom suggests a phased-in approach to implement the interim formula. This approach would provide whatever long-term benefits we see flowing from the interim formula, while allowing management to adjust to reasonably predictable changes and to minimize short term idling of capacity. Another alternative RCA Globcom suggests is a formula using only traffic generated in the gateways as the allocation base. This approach would encourage limiting marketing efforts resulting from the formula change to an area where the IRCs currently are authorized to provide full direct service, maintain offices and where the bulk of their marketing efforts are concentrated. Since each of the carriers operate in the same gateways, RCA Globcom submits that this approach equalizes their competitive positions and would eliminate the need for a competitive response to another carrier's solicitation efforts in those areas outside the gateways. Finally, RCA Globcom urges us to reconsider our action denying the IRCs direct access to customers outside the gateways. In support, RCA Globcom states that it is likely that if direct access were permitted, a larger fraction of the overseas messages would be routed according to customer choice since many customers outside the gateways already route their messages directly to the IRCs at their own additional expense.

B. Comments by WUI

15. WUI also opposes adoption of the interim formula on a permanent basis. WUI argues that a large shift of traffic from one carrier to another would leave the carrier losing traffic with substantial unused switching and transmission capacity, and could overload the recipient's facilities leading to a reduced quality of service. Further, WUI claims that these dual effects are contrary to our policy that carriers "utilize their investment in the most economical, cost efficient manner in order to generate sufficient revenues to cover their embedded costs." See AT&T Series 1000, Docket No. 21417, released October 21, 1977.

16. With respect to the competitive incentive contained in the interim formula, WUI's Vice President of Sales in an affidavit states "that the intensity of competition in terms of selling and marketing activities and precise offerings was no less under the Original

Formula than they are under the Interim Formula." The reason for this, according to WUI, is that outbound traffic generates inbound traffic and a customer satisfied with WUI's message telegraph service is likely a customer for WUI's other services.

C. Comments by ITT Worldcom

17. Contrary to the views of RCA Globcom and WUI, both ITT Worldcom and TRT argue that the interim formula possesses an independent justification supporting its retention. These carriers point to their experience with the interim formula during the past year as sufficient support for its justification. ITT Worldcom believes that the interim formula provides a significant improvement for the public interest and that it produces an allocation of traffic which is clearly "just, reasonable and equitable" on the record before us and on operating experience to date. In ITT Worldcom's opinion our primary responsibility is the development of a formula which provides a fair allocation of traffic among each of the participating carriers. It states that the interim formula is administratively simpler than the original formula and, consequently, that there is substantially less chance for error on the part of the Quota Bureau or Western Union in calculating the allocation to each carrier. Moreover, since Western Union has automated the distribution of unrouted traffic, according to ITT Worldcom, as a result of the adoption of the interim formula, the unrouted traffic can now be distributed faster and more efficiently and ultimately at a lower cost to the carriers.

18. ITT Worldcom has submitted an affidavit by its Executive Vice President and General Manager describing several improvements it has undertaken since the adoption of the interim formula and which it states were in part due to the incentives created by that formula. According to this statement, ITT has already undertaken a program of improvement in its overseas message service with the goal of increasing its share of routed messages traffic and thereby increasing its share of unrouted traffic pursuant to the formula. ITT Worldcom lists the following service improvements as resulting at least in part from the formula's implementation.

(a) June, 1977 -- placed into service a new duplex international message switch to provide standby capability to enhance reliability and access time for customer transmissions. This first phase of improvement increased in-service time for message switching from approximately 95 percent to 98.5 percent. When full duplex capability is completed at the end of 1977, then in-service time for the switch is expected to be 99.9 percent.

(b) July, 1977 -- implementation via the new message switch of automatic processing of virtually all routed and unrouted trafffic from the Western Union system.

(c) September, 1976 -- provided a full speed interface for West Coast TWX subscribers of Western Union wishing to file message traffic directly with ITT Worldcom. This change permits a 50 percent decrease in a customer's transmission time. A similar capability is scheduled to go into service by January, 1978 for Atlantic Coast subscribers.

(d) 1976 -- instituted a service available twelve hours each day to answer questions from customers sending messages directly via telex or TWX or via the Western Union system, to answer questions about rates, to provide assistance in message tracing, and to answer other questions. This service is available free throughout the country by way of inbound WATS.

(e) July, 1977 -- expanded on-line message storage capability of the message switch from one half day of on-line traffic storage to approximately 30 days. This change also provides virtually instantaneous on-line retrievals. Retrieval time is now two seconds as opposed to the formerly variable time which, dependent on load, could run from minutes to hours.

(f) September, 1977 -- undertook steps to speed up operator processing for messages filed with ITT Worldcom by telephone.

(g) November, 1977 -- made facility changes improving access for all gateway subscribers and for all Western Union TWX originated traffic into the new message switch.

The affidavit states that without the incentive provided by the interim formula much of the allocation of resources and manpower which went toward improving the efficiency of its message telegraph service might have been channeled to other services.

D. Comments by TRT

19. TRT in supporting retention of the interim formula asks us not to disregard the important public interest element supporting that formula or to misconceive the public interest responsibilities delegated to us by Section 222 of the Act. TRT states that the interim formula performs an important public service by which the choices of knowledgeable consumers can be extended to those consumers who have

inadequate overseas communication requirements to become sufficiently informed about the merit of particular carriers. Moreover, TRT argues that the formulation of a device which allows the free functioning of a competitive market, in and of itself, serves the public interest, unless the parties supporting retention of the former scheme can bring forward specific justifications which outweigh the implementation of a competitive policy. TRT contends that there is nothing in the basic purpose or language of Section 222 suggesting that it was designed to repress fair competition among the carriers permitted pursuant to Section 214 to enter the market once Western Union had divested its international operations and the possibility of anticompetitive abuses had passed.

20. Next TRT states that in its experience the implementation of the interim formula has not caused the carriers to embark on a course of undue promotional expenditures. Rather, TRT itself has aimed its promotional efforts at high-volume users who subscribe to telex services of either the IRCs or Western Union, and has not undertaken any significant effort to obtain routed traffic from those who customarily do not route messages. Thus, according to an affidavit filed by its Vice President of Marketing, TRT has not altered its "sales and marketing approach with respect to industry-wide marketing and sales efforts."

21. TRT also states that implementation of the interim formula has not increased the IRCs' operational costs. With a single exception it has transmitted all traffic received under the interim formula via circuits then in place or necessitated by the commencement of direct circuit operations to a new overseas point. Nor has TRT been obliged to employ additional message operators as a result of the interim formula. Finally, TRT states that the capacity of its automated message switch has been adequate to handle the additional volumes of traffic that have been generated by TRT's participation in the new formula. In sum, TRT has experienced no increase in either promotional or operating expenses as a result of the adoption of the interim formula. According to TRT, its experience stands as a clear demonstration that there is no reason whatsoever to believe that the interim formula may cause increased promotional or operational expenses among the carriers in providing the public with message telegraph service.

E. Comments by Western Union

22. Western Union has filed a letter stating that the existing formula mode of routing international message traffic should be continued. However, it takes no position as to the precise formula to be implemented or the appropriateness of the interim formula.

DISCUSSION

23. Our review of the comments filed by RCA Globcom and WUI opposing a permanent prescription of the interim formula shows that these carriers essentially have raised three possible defects in the formula. We will address each of these matters separately.

24. The first alleged defect arising from the operation of the interim formula is that it requires potentially millions of dollars in additional advertising and marketing costs to be incurred by the IRCs. RCA Globcom rests this argument on an analysis of the cost of a nationwide marketing and advertising campaign. It states that the cost of such an effort for itself would be $2,007,000. Despite this projection, it is plain to us that no carrier including RCA Globcom plans to undertake such an effort. RCA Globcom indicates it has budgeted $670,000 for solicitation of message telegraph traffic. While this is a substantial increase over its prior message service marketing expenditures, we find no indication in RCA Globcom's pleadings that it is considering increasing its solicitation expenditures to the scale it claims is necessary for nationwide coverage. In any event, RCA does not advance specific facts to show that the public interest would be disserved by increased marketing efforts. Indeed, it appears that the basis for RCA's increased solicitation efforts lies in its recognition that the interim formula has brought about greater competitive efforts by the IRCs and that to expand its volume of message traffic, or to retain its substantial standing in the market it must increase its marketing efforts. We believe that this added emphasis on marketing will soon give rise to efforts, like those of ITT Worldcom, to improve, where possible, the facilities underlying service to the public. In sum, as the Court in its decision granting rehearing has noted the purpose of the original formula

> cannot be stretched to giving RCA a right in perpetuity to a fixed share of the telegraphic market regardless of changing conditions and circumstances. It certainly could not have been the intention of the Congress or the FCC to permit RCA to sit back and do nothing to counteract tactics by its competitors and rely upon the 'formula' to give it the lion's share of the unrouted business.

Accordingly, we reject this argument.

25. Secondly, both RCA Globcom and WUI argue that the interim formula diminishes use of existing circuitry of communications and consequently may cause the idling of direct circuit capacity already in place. The point that RCA and WUI are attempting to make is that the implementation of the interim formula has resulted in a shift of traffic from carriers with a direct circuit to a particular destination point to carriers which cannot directly serve that point but, instead, must

interconnect with another entity before handing over the message for ultimate delivery. RCA Globcom estimates that in 1977 over 50,000 messages will be shifted to carriers lacking direct service capability to the 21 countries RCA Globcom has indicated. Moreover, RCA Globcom estimates that this reliance on indirect service will result in an increased payout of $130,000 to foreign carriers.

26. We find no significant merit in this argument. At paragraphs 49 and 50 of our Report and Order, we considered a proposal to allocate unrouted traffic on a country by country basis among only those IRCs authorized direct circuits to a customer's desired points. Nevertheless, we chose to base distribution of unrouted traffic on the destinations a carrier is authorized to serve via direct circuits or by interconnection. One reason we rejected the direct circuit approach is because it would leave significant gaps in the distribution of unrouted traffic since there are numerous foreign destination points which no carrier serves directly. We also rejected this proposal because it would deny substantial portions of unrouted traffic to small carriers who serve a higher percentage of their service points through intermediate connections. We believe that those carriers now providing indirect service will seek authorization to serve those points directly if the demand for their services to a particular destination point becomes sufficient. Moreover, we note that the 50,000 messages which RCA Globcom states have been shifted to indirect circuits due to the formula, amount to less than one half of one percent of the 7,887,664 worldwide annual messages the carriers transmit. This de minimis shift of traffic to indirect service is not in our opinion a threat to the public interest.

27. Finally, RCA Globcom contends that the interim formula encourages the IRCs to concentrate their efforts on existing customers who already route traffic. Here, TRT as well as our review of RCA Globcom's marketing experience to date underlines the validity of RCA Globcom's claim. However, we do not find anything in this marketing approach that persuades us to set aside the interim formula. Western Union's study shows that in 1974 three quarters of the international message traffic handled by it was unrouted. Much of this traffic appears to be originated by persons with only an occasional use for message telegraph traffic.

28. We emphasize that our goal is to encourage the carriers to continually strive to offer the public the best service possible at the lowest possible rates. The interim formula is a powerful incentive towards achievement of this goal. As RCA has noted, the interim formula rewards a carrier for every routed message with two or three unrouted messages. In contrast, the 1943 formula did not reward improvements in services or prices at all,

but stood as a disincentive to such improvements. 5/ The customers who do route their traffic, for the most part business customers, are keenly interested in the best service for the lowest cost and do educate themselves about the IRCs. 6/ By correlating the distribution of unrouted messsages with routed messages, we insure that improvements in service or prices which earn the business of knowledgable users will also be rewarded by unrouted messages. Thus, the incentive to provide the very best is maximized, and the public interest will benefit accordingly. The service and price improvements made to attract knowledgable users also enhance the quality of service to casual users since the facilities making up the service are blind to the identity of customers and to the manner in which the message came to be the responsibility of the carrier. In this regard it is particularly interesting to note that ITT Worldcom while making no representation concerning its present marketing efforts has by affidavit described the service improvements which in the judgment of its Chief Executive Officer have been brought about in part due to the additional degree of competitive incentives contained in the interim formula.

29. In sum, we cannot find that RCA Globcom's reduction in routed messages is a sufficient reason to bar or defer the operation of the interim formula. As we stated at paragraph 53 of the Report and Order

> RCA appears to be asserting that its quota gives it a claim to a guaranteed amount of traffic. The present formula does not guarantee any carrier that it will receive traffic. As more customers routed messages and the unrouted pool shrank, traffic available for distribution became inadequate to satisfy quotas. Such changes in the marketplace can hardly be said to have wronged RCA

5/ See p. 201 of the Report and Order demonstrating that "the ultimate effect /of the original formula/ was that the carrier with the largest deficiency eventually came to receive all unrouted traffic to a given destination.

6/ Whether customers learn of the advantage of using an individual IRC by solicitation, advertisement, or customer word-of-mouth is not a matter of concern to us.

particularly since its own increases in self generated traffic and the benefits its received under schedule B (special provisions applying to RCA) contributed to this process.

In this instant proceeding, RCA has brought forward nothing to cause us to modify that finding. Moreover, we can find no indication by RCA that the quality of service it provides to the public would suffer in any way by retention of the interim formula.

RCA Globcom's Proposed Alternative Formulas

30. In addition to opposing retention of the interim formula, RCA Globcom has suggested various alternative proposals which it believes to be more equitable among the carriers and to better serve the public interest. It recommends (1) consideration of a phase-in period for the interim formula, (2) limiting the formula's operations to traffic originating in the gateway cities, or (3) if the interim formula remains in effect, permitting the carriers at their expense to serve directly message telegraph customers located outside the gateways.

31. We are of the opinion that these alternatives are unnecessary to the implementation of the interim formula or would fail to serve the public interest as positively as the interim formula. Therefore, we shall reject them. In the first place, we are satisfied based on our own expertise and the remarks the carriers have filed concerning the actual operation of the interim formula that it is functioning smoothly. Indeed, we have seen no persuasive evidence that a phase-in period is necessary for the carriers to provide their services to the public. Aside from the wholly unsupported claim of adverse financial impact RCA Globcom has alleged, it appears that only minor short term adjustments such as a slightly greater reliance on indirect circuits, and consequent pay-outs have occurred due to the implementation of the interim formula. In sum, the actual experience of the IRC under the interim formula persuades us that a phase-in period is totally unnecessary and would disserve the public interest by delaying the incentives the IRCs have under the formula to improve their services and to offer them at the lowest possible rates.

32. Likewise, we can find no merit in artifically limiting the competitive incentive of the carriers to customers located in the gateways. We recognize that much of the carriers present solicitation efforts are directed toward customers in those discrete areas and may continue to be at least in the short run. However, to focus the efforts of the carrier on these points would go far toward institutionalizing the very criticism RCA Globcom has put forward supporting rejection of the interim formula, since the carriers would then be free to concentrate their efforts on those major customers located in the

gateways without any incentive whatsoever to take into consideration the needs of the public outside the gateways. In this regard, we specifically affirm our findings in the Report and Order at paragraph 51 with respect to inclusion of all areas of the Continental United States in the formula. We stated that

> /w/e believe that the volume /for inclusion in the quota base/ should be based on all routed traffic. This includes direct pickups, direct access and routed WU transfers. This is the most likely way to achieve the goal of distributing unrouted traffic on the same basis as routed. Direct pick-ups /traffic routed directly to the designated carrier by a customer located either inside or outside the gateways/ are by definition specifically routed and represent a significant portion of overall traffic. Therefore, to ignore such traffic would be unrealistic and contrary to our policy herein.

33. Finally, we deny RCA Globcom's request that we revisit our action rejecting the tariffs underlying the free direct access concept in International Carriers Communication, 40 FCC 2d 1082 (1973). In that case we found that the IRCs must file applications pursuant to Section 222 to expand their operations beyond the gateways rather than proceeding by tariff because adoption of "free direct access would alter the structure of the industry by altering the relationships between the domestic and the international carriers as to the handling of international traffic." Thus, we have already concluded that the filing of applications justifying any expansion of operations outside the gateways is a prerequisite to any proposed expansion. We will not entertain RCA Globcom's suggestion here. It is sufficient to note we are considering the application and comments RCA Globcom has filed in Docket No. 19660.

FINDINGS REGARDING INTERIM FORMULA'S OPERATIONS

34. In our Report and Order we found that the interim formula provides the carriers with an equitable means of distribution, focusing on customer selection and giving each carrier an opportunity to increase its share of unrouted traffic. The interim formula, by functioning in a direct ratio method has simplified administration of routing allocations to the carriers and eliminated many of the sources of controversies found in the original formula. This simplification is accomplished through treating all classes of messages as a whole rather than retaining the aspect of the original formula which required allocation of unrouted traffic to be made according to the various classifications of the messages in the message telegraph service, and which also necessitated separate treatment of gateway and non-gateway traffic. Instead, the interim formula treats all message traffic generated in the continental United States in the same way, distinguishing only between routed and unrouted messages.

6963

35. It remains Western Union's function to distribute specifically routed traffic to the designated carriers. The unrouted traffic Western Union receives is distributed to the IRCs in the ratio each receives specifically routed traffic. Rotational distribution of messages to the carriers as they are received by Western Union insures that over the long run each carrier receives the revenues to which it is entitled under the formula. The deletion of the balancing provisions, since there is no longer any need or justification for them, eliminates distortions in distribution as well as long term accumulation of averages and deficiencies. Short run imbalances arising due to traffic variations are corrected by adjustment of the carriers' ratios. The provision for periodically adjusting the ratios assures that traffic distribution remains responsive to changing conditions brought about customer selection.

36. Under the interim formula each carrier receives unrouted traffic to all points it is authorized to serve. If a carrier adds a new service point, the formula is adjusted to include that carrier in the distribution of unrouted traffic according to the amount of traffic specifically routed through it to that point. Since adjustments concerning new points of service are made at six month intervals, Western Union has added certainty in meeting its responsibilities under the formula and is spared too frequent changes in its distribution practices. The Quota Bureau calculates the IRC's ratios of unrouted traffic for each country of destination by determining the number of messages specifically designated by customers to a particular carrier. The individual carrier figures are then totalled every six months for each destination and each carrier's figures compared to that total. The resulting ratios represent each carrier's share of routed traffic for each destination point and therefore, its portion of unrouted traffic under the interim formula to that point.

INDEPENDENT JUSTIFICATION OF THE INTERIM FORMULA

37. The interim formula provides each carrier with the same opportunity as every other carrier to share in the pool of unrouted overseas messages Western Union receives. Through the mechanism of distributing these unrouted messages to carriers in direct proportion to the number each receives to various overseas destinations, the formula encourages each carrier to strive to secure as many messages on a routed basis as possible. In other words, a carrier's share of total message traffic is dependent upon its success in persuading users of the service to place messages directly with it. This method of distribution provides a simple means for the Quota Bureau to administer the formula and for Western Union to distribute traffic. Since all messages originating in the continental United States are treated the same, rotational distribution of messages insures a random distribution among the carriers. The direct ratio mechanism ensures that the formula will generate few compliants about the number of unrouted messages allocated to the individual carriers. As a result, Western Union may meet its allocation responsibilities through an automated distribution system, thereby greatly reducing its own administrative costs and limiting the need for the Quota Bureau to resolve compliants. Those few complaints the carriers

bring to the Quota Bureau, and none have been brought to our attention in the pleadings, may be equitably disposed of since the formula leaves little room for dispute once the facts, based on the Quota Bureau statistical reports are ascertained and the straight forward allocation system we have prescribed is applied to these facts. Disputes which the Quota Bureau cannot resolve are referred to us for action.

38. The improvements already made by ITT Worldcom under the interim formula are of the type we anticipated the formula would inspire, and provide concrete confirmation of the new formula's service to the public interest. We expect that once the formula is accepted as the rule, such further improvements will soon be forthcoming from all the carriers. All the IRCs, whether opposing or favoring retention of the interim formula, acknowledge that it maintains or increases the incentive to secure as many direct routings as possible. Our past experience in other areas, confirmed now by ITT's actions under the interim formula, has shown that carriers competing in this fashion must out of self interest strive to improve service efficiency and to keep charges as low as is feasible. Such improvements benefit all customers, routing and non-routing alike, because the facilities provide the same service to both without distinction. Therefore, we find that the interim formula is just, equitable, reasonable and in the public interest on its own merits and that it is in no way dependent for its justification on a required routing system of distributing international message telegraph traffic. 7/

39. Accordingly, IT IS ORDERED, Pursuant to Sections 1, 4(i), 4(j), 201, 222(e)(1), 222(e)(3) and 403 of the Communications Act of 1934, as amended, that the formula set forth in the Appendix hereto IS PRESCRIBED as the distribution formula for outbound international message telegraph traffic.

40. IT IS FURTHER ORDERED, that this proceeding is TERMINATED WITHOUT further action concerning the proposed required routing formula for the distribution of outbound international message telegraph traffic.

FEDERAL COMMUNICATIONS COMMISSION

William J. Tricarico
Acting Secretary

7/ We will continue to closely monitor the carriers' activites in the messages telegraph service, and remain ready to further modify the formula should the public interest so require.

APPENDIX

Formula, Pursuant to Section 222(e)(1) of the Communications Act, for the Distribution of Outbound International Message Telegraph Traffic Handled by the Western Union Telegraph Company, As Amended Through December 22, 1975.

This formula, pursuant to Section 222(e)(1) of the Communications Act of 1934, as amended, provides the method for distribution by The Western Union Telegraph Company (hereinafter referred to as Western Union) among international telegraph carriers of outbound international message telegraph traffic handled by it within the Continental United States, as that term is defined in Section 222(a)(10) of the Communications Act.

The traffic for which distribution is provided herein is all message telegraph traffic by wire or radio, specifically routed or unrouted, handled by Western Union originating in the continental United States, provided, however, that quotas established in Section V hereof shall not apply to the non-message or measured services offered by the carriers, nor to marine (shore to ship) traffic handled by Western Union with respect to the distribution of which a separate formula is annexed hereto as Schedule B.

II. Interested Carriers

The international carriers interested in the distribution of traffic provided for in this formula will be the following (unless and until other international carriers enter business):

Canadian Pacific, Ltd.
French Telegraph Cable Company
ITT World Communications Inc.
RCA Global Communications, Inc.
TRT Telecommunications Corp.
U.S.-Liberia Radio Corp.
Western Union International, Inc.

In general, an international carrier is interested in the distribution of traffic provided for herein whenever it handles routed traffic to a destination point under the conditions set forth in Section V, below.

III. Specifically-Routed Traffic

The right to receive a quota under this formula shall not purport in any manner whatsoever to limit or to restrict a carrier's scope of future operations; and a carrier shall always be entitled to receive its specifically-routed traffic to all destination areas, if it accepts such traffic in pursuance of its published tariffs and transmits it to an overseas point.

(ii) if, when filed by messenger, the message contains a specific routing which has been previously inserted by the sender (Messages shall not be considered specifically routed merely by virtue of the use of a particular carrier's telegraph blank),

(iii) if, when filed by telephone (whether to a Western Union office, an agency office, or to a Western Union Central Telephone Bureau), a specific routing is inserted by the receiving clerk at the unsolicited request of the sender, or

(iv) if, when filed over a tieline or other directly-connected facility, the specific routing has been transmitted by the sender; and

(e) (Special interim provision for Western Union International, Inc.). Messages shall be considered specifically-routed via Western Union International, Inc. when they are filed, without specific routing via another carrier having been designated by the sender, at all offices of Western Union located in the area south of 60th Street in the Borough of Manhattan, New York; the main office of Western Union in San Francisco, California; and the main office of Western Union in Washington, D. C. (all the above of which shall be considered as Western Union International public offices for purposes of this Section).

Traffic specifically routed by the sender via a particular carrier and destined to points not tariffed by that carrier shall be considered unrouted and shall be distributed in accordance with the provisions of Sections V and VI below.

But nothing in the foregoing shall be construed as requiring any international carrier to accept, over tieline facilities furnished to its customers by a particular carrier, messages which are routed by the sender via another international carrier.

V. Quotas

For outbound, unrouted international telegraph messages destined to particular international points, originating at points within the continental United States handled by Western Union, there shall be for each international carrier a quota of such traffic calculated without consideration either of the category 1/ or length of the message. An international telegraph carrier is entitled to receive from Western Union unrouted traffic under this formula picked up by Western Union for each overseas destination point listed in that carrier's effective outbound message telegraph tariff as of the release date of the order prescribing this

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1/ The catagories of service recognized by the parties to which this formula applies are those shown in Schedule A of this formula.

IV. Categories of Messages

For purposes of calculating the quotas specified in Section V, below, all categories or classes of traffic shall be considered in the aggregate with one quota covering all classes of message telegraph traffic.

Notwithstanding any provision in this formula to the contrary, Western Union and all international carriers shall respect specific routings of any messages handled by it, and shall transfer to another carrier any messages specifically routed via such other carrier. All international messages delivered by Western Union shall carry in the preamble the agreed upon "via" of the international carrier which transferred the message to Western Union. Messages shall not be considered specifically routed by virtue of the use of a particular carrier's telegraph blank. For purposes of, and whereever used in, this formula, a message shall be considered specifically-routed via a particular carrier in any of the following cases:

(a) Where messages are filed at an office established, operated, and maintained by an international carrier, whether filed in person, by messenger, by telephone, or received over a tieline or other directly-connected facility terminating in such office, unless the customer specifically routes such messages via a carrier other than the carrier maintaining such office (direct gateway pickup);

(b) Where messages are filed directly with a particular international carrier at its gateway office by means of domestic communications networks such as domestic telex, TWX, telephone, or mail, or by messenger so long as the customer pays all charges incurred in connection with the use of such means for the purpose of filing international messages (direct access);

(c) Where messages are filed with an international carrier by a customer located outside that carrier's gateway city by means of a tieline or other directly-connected facility terminating in that carrier's gateway office, so long as the costs for establishing, operating and maintaining such facility are borne by the customer (hinterland tieline);

(d) Where messages are filed with Western Union at any of its offices (except those specified in (e) below) or by other means of filing provided for in the Western Union tariff, and transferred by Western Union to an international carrier over Western Union's landline system, so long as the following conditions are met:

(i) if, when filed in person, the specific routing is written in by the sender,

formula, whether that carrier serves such point directly or by interconnection; and, thereafter, a carrier shall be entitled to a quota for each additional destination point which that carrier is authorized by the Federal Communications Commission to serve directly. As determined in accordance with the preceding, an international carrier's quota shall be, for each eligible destination point, the ratio of the number of outbound routed messages to such destination point (as calculated pursuant to Section IV above) handled by such international carrier during the base period to the total number of routed messages destined to that point handled by all international carriers serving that point (whether picked up directly by the carrier or transferred to it by Western Union) during the same period. Upon the effective date of this formula, the initial quotas shall be calculated on a basis as the Federal Communications Commission shall by order prescribe. Thereafter, the quotas shall be recalculated at six-month intervals on the basis of traffic figures for the equivalent preceding six-month period, at which time any adjustments to the number of destination points served by international carriers which have occurred since the previous adjustment shall be communicated to the administrative body provided for in Section X below which shall communicate to Western Union the appropriate change to be made in its distribution of traffic. The above adjustment shall take place on dates to be determined by the interested parties.

VI. Distribution of Traffic in Accordance with Quotas

The quotas established by Section V hereof shall be applied by Western Union as follows:

(i) Specifically-routed traffic shall be transferred to the international carrier indicated by such routing; and

(ii) Unrouted message shall be distributed (without regard either to their length or classification of service) in the order of their arrival at the Western Union distribution office so that each international carrier will receive a volume of unrouted messages which will equal its quota. If the messages so distributed fail in any month to give the international carrier its quota, the distribution of messages shall be modified as soon as practicable after the ascertainment of such deficiency in such manner as to compensate for such deficiency and to assure to such carrier thereafter receives its quota. Inasmuch as the quota system set forth herein is designed to change automatically if traffic patterns change, the imbalance referred to above will be essentially self-correcting. However, in no event are deficiencies which may result in the short run to be considered legal obligations in which any carrier has a vested interest; and, accordingly, there shall be no accumulation of such deficiencies from year to year. Each international carrier entitled to share in such distribution shall furnish to the joint distribution office any information necessary to enable such distribution of unrouted messages to be effected in accordance with this formula. For purposes of the semi-annual adjustment to the quotas provided for in Section V above, all interested international carriers shall determine dates each year by which traffic data is to be supplied to the committee provided for in Section X below.

If any international carrier entitled to a quota reserves in any month a larger percentage of unrouted messages than its quota, Western Union shall transfer to the other international carriers interested therein a sufficient number of unrouted messages destined to the same point to balance the excess received by the particular international carrier. These overages shall not be considered legal obligations of the particular international carrier and shall not be accumulated from year to year.

VII. Distribution Offices

The Merged Company shall distribute traffic destined for transfer to an international carrier from a distribution office or offices selected by it and approved by the Commission.

Each international carrier entitled to share in the distribution of messages from distribution offices of the Merged Company shall have access to such distribution offices at any time to protect its interests in the method of making such distribution and transfer of messages to its operating rooms.

VIII. Transit Traffic

It is understood that this formula does not cover any telegraph traffic originating outside the United States and transiting the United States, and that all such traffic handled by Western Union shall be turned over to the international carrier which would have handled the same if the consolidation or merger of Western Union and Postal Telegraph, Inc., had not occurred or as may be specifically routed.

IX. Equality of Treatment of International Carriers and Division of Charges

Except as provided in Section IV of this formula with respect to message traffic originating in certain gateway offices of Western Union, the services furnished by the Merged Company to the international carriers in connection with the handling of international traffic covered by this formula shall be uniform and non-discriminatory; and the division of charges for such outbound international traffic shall be such that Western Union shall retain or receive, for landline haul in connection with international traffic handled by it, or for pickup services, amounts which shall be prescribed from time to time by the Federal Communications Commission.

X. Administration

The supervision of the operations of this formula shall be by a committee of representatives of each of the interested international carriers, in which committee each carrier shall have equal representation, and the costs of which shall be equitably shared by the international carriers.

All costs involved in the maintenance by Western Union of distribution offices and in the distribution by it of traffic under this formula, including the cost of maintaining appropriate records as to the distribution, shall be equitably shared by the international carriers receiving traffic under this formula and reimbursed by them to Western Union; and all costs of distribution of traffic beyond the distribution offices of Western Union shall be borne by the international carriers. In the event there is disagreement among the members of the committee with respect to any feature of the distribution of traffic under this formula, the disagreement shall be submitted to the interested carriers, including Western Union. In the event the carriers are unable to agree among themselves, the matter shall be submitted to the Federal Communications Commission for a ruling.

XI. Effective Date of Formula

The provisions of this formula shall become effective and shall govern the distribution of traffic on February 1, 1976.

SCHEDULE A - DIVISION OF OUTBOUND CHARGES

The landline or pickup charges shown in the table below opposite each service classification under the caption "Divisions Per Word", and the number shown in the table below opposite each service classification under the caption "Minimum Number Chargeable Words Per Message," shall be respectively the charges per word (cable count), and the fewest number of words (cable count) per message which are to be charged by Western Union for handling outbound international message traffic in each classification handled by it regardless of the point of origin in the United States or the point of transfer to an international carrier in the United States, provided, however, that the merged company shall continue to pay to the Canadian carriers the same amounts per word which were being paid on July 1, 1958, with respect to that traffic exchanged with Canadian carriers destined to those points which are subject to the Telecommunications Agreement between the United States of American and British Commonwealth Governments (TIAS 2705, 1952).

Landline Haul Divisions

	Minimum Number of Chargeable Words Per Message	Division Per Word (cents)
Full Rate	7	9.5
Letter Telegram	22	4.75
U.S. Government Full Rate (No discount)	7	9.5
U.S. Government Full Rate (At discount) */	7	4.75
U.S. Government Letter Telegram	22	4.75
Other Government Full Rate (No discount)	7	9.5
Other Government Full Rate (At discount) */	7	4.75
Other Government Letter Telegram	22	4.75
United Nations Full Rate (No discount)	7	9.5
United Nations Full Rate (At discount) */	7	4.75
United Nations Letter Telegram	22	4.75
Meterological	7	4.75
Urgent Press	14	9.5
Ordinary Press	14	3.1

*/ The "At discount" division shall apply if a discount of 50 percent applies to the through rates. As soon as the discount is eliminated with respect to any point, the charges applicable to "No discount" traffic shall automatically apply.

FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

October 7, 1977

IN REPLY REFER TO:

9700

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Gentlemen:

On October 5, 1977, the United States Court of Appeals for the Second Circuit granted petitions for rehearing filed by the Commission and ITT World Communications, Inc., in RCA Global Communications, Inc. v FCC, Case

No. 522. The case involves our Report and Order and Notice of Proposed Rulemaking, 57 FCC 2d 190 (1975) in which (1) we found the formula governing distribution of outbound, unrouted international message telegraph traffic among the international record carriers to be unjust, unreasonable, inequitable and not in the public interest, (2) instituted a proposed rulemaking examining the legal, economic and operational implications of placing distribution on a required customer routing basis, and (3) prescribed a new or "interim" distribution formula pending the outcome of the inquiry looking into all routed distribution.

In granting the petitions for rehearing the Court directed us to hold further proceedings and to make further findings concerning "whether the promulgation of interim formula has, in the opinion of the FCC, a factual basis in the record independent of the FCC's tentative preference for on all-routed system". The Court also suggested that after 10 months of experience with the "interim" formula interested parties could now file comments concerning its operations. Finally, the Courts stated it was retaining jurisdiction over the case and that it expected us to conclude our proceedings within 60 days from the date of its order and to allow 30 days for the filing of comments within that period.

In view of the foregoing, we are inviting interested parties to file comments by November 5. 1977 addressing those issues outlined in the Court's decision. Since the Court has suggested that we act within 60 days, the parties are cautioned that no extensions of time to file are contemplated and that the Commission will consider only comments filed by November 5, 1977.

Sincerely

Philip V. Russell

for Walter R. Hinchman
Chief, Common Carrier Bureau

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

In the Matter of	:	
International Record Carriers' Scope of Operations in the Continental United States, Including Possible Revisions to the Formula Prescribed Under Section 222 of the Communications Act.	:	Docket No. 19660 RM-690

To: The Commission

COMMENTS OF RCA GLOBAL
COMMUNICATIONS, INC. ON REMAND

In response to the Commission's letter of October 7, 1977 (Reply Ref. 9700), RCA Global Communications, Inc. (RCA Globcom) submits herewith its comments with respect to the matters which the United States Court of Appeals for the Second Circuit referred to the Commission for further analysis and study in the Court's Opinions of July 27, 1977 (559 F.2d 881) and October 5, 1977 in its Docket No. 76-4054.

In its Opinion of July 27, the Court vacated the Commission's Report and Order and Notice of Proposed Rulemaking, released on January 7, 1976, 57 F.C.C.2d 190 (1976) (the "January 7 Order").* In its subsequent Opinion of

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* The January 7 Order established the so-called "Interim International Formula ("Interim Formula") as a basis for the distribution by The Western Union Telegraph Company ("Western

(continued on next page)

October 5, the Court asked the Commission to determine "whether the promulgation of the 'interim' formula has, in the opinion of the FCC, a factual basis in the record, independent of the FCC's tentative preference for an all-routed system."*

In our view, the Commission cannot reasonably conclude that it has. This was true, we submit, when that formula first was announced in January 1976. And, after more than eleven months of experience under it this conclusion is clearer still. Under the circumstances, the Commission's only proper course, we submit, is to advise the Court that the Interim Formula has no proper basis and that, in accordance with the Court's decision, this matter requires further study and analysis. Pending such study, the Original Formula, which the Court did not find to be "unlawful",** should be restored.***

(continued from preceding page)

Union") of unrouted international telegrams among the U.S. international record carriers (sometimes referred to herein as "IRCs"). Due primarily to an administrative stay of the January 7 Order, the actual changeover to the Interim Formula did not take effect until mid-November, 1976.

* Slip Opinion of October 5, 1977, pp. 4-5.

** Id., p. 3.

*** We understand that since both the Original and Interim Formulas are on a fully-automated basis, it would take Western Union approximately thirty days to restore operations under the Original Formula. (Letter from Western Union counsel to all parties of August 1, 1977.) We further understand that the costs of such restoration would be nominal.

This, as the Court made clear, would be without prejudice to the Commission's prerogative, if so disposed, to pursue, in further proceedings, other alternatives to the Original Formula which would meet the statutory standard of being "just, reasonable, equitable, and in the public interest."* While we adhere to our oft-expressed view that the "all-routed" concept is not such an alternative, there are, as we show, other approaches which the Commission might appropriately explore if it still concludes that the Original Formula should ultimately be replaced.

Preliminary Statement

In its two previous attempts to address the Interim Formula -- in its January 7 Order and its further Memorandum Opinion and Order of September 27, 1976** -- the Commission, we submit, paid insufficient attention to the public interest considerations which RCA Globcom has persistently sought to raise. These considerations weigh against the simplistic modification of the international formula which the Commission has heretofore sought to promulgate.

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* Section 222(e)(3) of the Communications Act of 1934, as amended, 47 U.S.C. § 222(e)(3).

** 61 F.C.C.2d 183.

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RCA Globcom does not believe that it is necessary to recount in detail the various provisions of both the Original (1943) and Interim Formulas, the general manner in which they operate or the extensive procedural history of this docket. This background information has been provided in the Court's Opinions, in the Commission's prior Orders in this Docket and in various pleadings previously filed with the Commission.

We would, however, emphasize the following:

-- The Court did not find in either of its Opinions that the Original Formula was unlawful or that the public did not receive less than the highest quality service under such formula. To the contrary, in its October 5, 1977 Opinion, the Court expressly stated that "[w]e do not regard the 1943 formula as 'unlawful'."*

-- Communications Act § 222(e)(3) makes clear that, whatever the virtues or faults of the prior formula, any replacement must be found, on adequate proof, to be "just, reasonable, equitable, and in the public interest."

The thrust of RCA Globcom's present comments will be to demonstrate that the Interim Formula reflects an unsound,

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* Slip Opinion of October 5, 1977, p. 3.

a priori preference for "competition". This preference is unsupported by sufficient facts of record, or by the required analysis, which would suggest that the pursuit of such an abstraction serves, in this case, the Communications Act's fundamental objectives of assuring the American people efficient and economical communications service.

To the contrary, the Interim Formula suffers, not only from the infirmities which prompted the Court of Appeals to criticize the Commission's tentative preference for an "all-routed" approach,* but from some of its own. The Interim Formula has been shown, in its year of operation, to disserve the public interest by imposing unnecessary costs on the industry and by shifting traffic to less efficient routes. If allowed to stand, it will continue that disservice. The Interim Formula, moreover, is neither just nor reasonable nor equitable. Its effect is to shift abruptly, from one carrier to another, large amounts of traffic which the affected carriers had handled efficiently and upon which they had legitimately relied.

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* (See 559 F.2d at 888-891.) Consistent with the Court's limited remand, RCA Globcom will not repeat here its arguments against the "all-routed" proposal, except to the extent that they apply with equal, if not greater force, to the Interim Formula. We reaffirm, however, our prior positions as to the all-routed proposal and concur fully in the Court's view that the all-routed plan has no adequate basis in the record thus far made.

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We also will show, without prejudice to our basic position, that if the Commission still believes that the Original Formula requires modification and that Western Union's distribution of unrouted traffic should be linked, in some fashion, to an IRC's ability to obtain routed traffic, then the Commission should, in further proceedings, consider approaches different from those of the Interim Formula. These other approaches would better serve the public interest by minimizing the negative features of the current Interim Formula, as well as the adverse effects which have been inflicted on RCA Globcom by the abrupt change from the Original Formula to the Interim Formula.

I. The Interim Formula Is Not "Just, Reasonable, Equitable, and in the Public Interest"

A. The Interim Formula Will Impose Counterproductive Sales and Marketing Expense on the International Telegram Service.

As the Commission's January 7 Order made clear, a desired result of the transition to the Interim Formula -- in which unrouted traffic would be distributed in proportion to an international record carrier's share of routed traffic -- was "a more aggressive marketing effort" on the part of the IRCs.* In ruling on RCA Globcom's subsequent request for a

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* 57 F.C.C.2d at 215.

stay of the January 7 Order, the Commission again pointed out that the Interim Formula would lead to greater "solicitation efforts."* It discounted, however, the data we supplied which showed the negative impact these additional activities would have on the IRCs' relatively small and declining telegram service.**

The Court, in its July 27 Opinion, did not view the matter so lightly. The Court agreed with RCA Globcom that intensive advertising campaigns by the IRCs "would add materially to the cost of the messages and be a burden instead of a benefit to the public."*** The Court further noted the absence of findings of fact by the Commission as to the extent and nature of potential advertising and marketing costs which would be added to the international telegram service.

The Interim Formula -- indeed any distribution formula tied specifically to a mistaken notion that "competition" for customer routings is somehow an abstract good -- will markedly increase the IRCs' costs of providing telegram service. This arises from the need to engage in increased

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* International Record Carriers' Communications, 61 F.C.C. 2d 183, 189 (1976).

** See, e.g., RCA Globcom "Petition for Stay" of February 11, 1976, at p. 13.

*** 559 F.2d at 889.

sales and promotional efforts both to retain and improve positions in a market whose long-range prospects are negative. Indeed, in this key respect, the Interim Formula may well be even more objectionable than the all-routed approach since, under the Interim Formula, an IRC can obtain, for each routed message it solicits, two or three additional messages.* This adds to the incentive to engage in excessive and unnecessary marketing expenditures.

The public interest is adversely affected by the wasteful spending that must result. (It is worth recalling that a desire to eliminate such excesses and the costs they inflict upon users of the telegram service was one of the factors which prompted the promulgation of the Original Formula. (See 10 F.C.C. 184, 191 (1943).))

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* Under the Interim Formula, for each message carrier A obtains from carrier B's customer, there is the following effect: (a) one outgoing routed message is received; (b) one outgoing unrouted message is received; (c) as foreign administrations generally return incoming traffic to a carrier in proportion to the traffic it send overseas, one or two incoming messages may be turned over to carrier A. This "bonus feature" of the Interim Formula was neither recognized or considered by the Commission in its prior decisions. Although the Interim Formula apparently is intended to encourage efforts to reach those senders who do not now route, this unrecognized feature of the formula actually encourages IRCs to concentrate their efforts on senders who already route and to ignore those who do not. The operative reality of the Interim Formula is contrary to the Commission's purpose and intent.

Market research by RCA Globcom indicates that virtually all social traffic (in excess of 90%) and the vast majority of business traffic (approximately 65%) transferred to us by Western Union is unrouted. Since the implementation of the Interim Formula toward the end of 1976, RCA Globcom has been required to nearly double its combined advertising and marketing expenditures devoted to overseas telegram service, from approximately $340,000 in 1976 to approximately $670,000 (annualized) in 1977.* We now have many more sales representatives assigning a greater proportion of their total time to the telegram service. Despite this substantial increase in marketing effort (which we assume has its parallels at the other IRCs) there has been no discernible effect on the volumes of unrouted traffic generated by the public.

This increase marketing activity is directed primarily at large business customers who file their traffic through central communications centers and who can be reached by direct sales contact and institutional and direct mail advertising. This market segment accounts for virtually all the routed traffic. As we will discuss infra at pages 16-17, contrary to the hypothesis underlying the Commission's Orders

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* This increase is generally consistent with the figures we estimated at page 14 of our "Petition for Stay" of the January 7 Order filed in February, 1976.

in question, most of the IRCs' increased marketing activity resulting from the formula change of necessity has been directed, not at encouraging new customers to "route", but at capturing existing customers of their competitors who already "route".

RCA Globcom has been informed by its marketing personnel and advertising agency that a marketing program which would have some reasonable expectation of communicating with, let alone convincing, the occasional (predominantly social) senders of unrouted telegrams in an attempt to obtain their routings,* would require, at a bedrock minimin, the following additional costs:

(i) Advertising campaign to the public:

Any attempt to reach the social users who are scattered across the country and who originate the bulk of the unrouted traffic would involve a costly advertising campaign. A minimum campaign with a nationwide reach appropriate to the Commission's apparent objective, would we are advised, require six insertions in a major monthly magazine

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* Such senders often may be people using the service on a once-or-twice-in-a-lifetime basis, and they rarely send more than one or two messages a year.

(Reader's Digest, for example), plus 13 insertions in a major weekly periodical (TV Guide, for example). Our adververtising consultants also advise us that space and mechanical costs for such a program would come to about $947,000. Such campaigns would have to be renewed, from time to time, to maintain effective contact with the "market".

(ii) Marketing campaign to corporate users:

A significant portion of unrouted telegram traffic is initiated by corporate users who do not file through a central corporate communications room, but rather telephone Western Union and are charged either directly by Western Union or by AT&T on their telephone bills. To attempt to reach these business users, a coordinated campaign of advertising mailings (at an estimated cost of $240,000), plus added concentration by RCA Globcom's sales force on telegrams (at an approximate cost of $150,000) would be required.*

In summary, if such a sales effort were to be undertaken by RCA Globcom, it would involve the following cost exposure:

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* The cost figures for direct mail represent the estimated expense of 4 mailings to each of 100,000 potential corporate telegram users. Additional salesmen also would be required to follow up with these customers.

	Current Costs		
	Advertising	Marketing	Total
	$45,000	$625,000	$670,000
	Additional Projected Costs		
i. Social User	947,000	-	947,000
ii. Corporate User	240,000	150,000	390,000
Total Costs	$1,232,000	$775,000	$2,007,000

If others in the industry were to follow suit and increase their marketing efforts correspondingly, we estimate that at least three times the expenditures we project for RCA Globcom would be spent by the industry overall. These added costs could constitute as much as 15 percent of total revenues derived by the IRCs from the international telegram service of about $42 million annually,* and will exacerbate the losses already being sustained on the telegram service by RCA Globcom and others, thereby increasing the existing pressure for rate increases to the public.

Conversely, as we pointed out both in our prior pleadings to the Commission and our briefs to the Court, the Interim Formula confers no compensating benefits upon the

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* The revenue figure represents outbound, inbound, and transit traffic. If the added costs were applied solely to the outbound traffic which they are designed to influence, the marginal cost rate would approximately double.

communicating public. The additional expense incurred will merely serve to redivide a static or declining market and not generate new business. As the Court of Appeals pointed out in its Opinion of July 27, the typical sender of unrouted traffic is satisfied to file his message with Western Union and leave the matter of transmission to the telegraph company. The net effect of the Interim Formula works to the overall disadvantage of the public from the standpoint of both cost and efficiency.

B. The Interim Formula Does Not Promote the Efficient Handling of Traffic

Contrary to the Court of Appeals' apparent belief (Slip Opinion of October 5, p. 2), the best known technological methods of transmission are not always utilized under the Interim Formula, although those methods were available under the Original Formula and would be again if it were restored pending additional Commission studies of possible alternatives to that Original Formula.

The Interim Formula in operation has resulted in a shift of traffic from direct circuits maintained by carriers such as RCA Globcom to indirect routes maintained by other carriers. This has several negative effects:

(i) It results, by the Commission's own analysis discussed below, in less efficient traffic handling.

(ii) It results in increased payouts to foreign administrations from the U.S. share of the revenues. Thus, a given volume of traffic produces less total revenue sharing with transitting overseas administrations. This in turn increases the pressure for rate increases to the U. S. public.

(iii) Communications capacity which RCA Globcom has in place and available to handle this traffic on a direct basis has been idled.

As a result of the introduction of the Interim Formula, over 50,000 unrouted transfers from Western Union to the IRCs, destined for the 21 countries listed in Attachment A hereto, will be reallocated in 1977 from IRCs with direct circuits to those destinations to IRCs which do not have direct circuits to those countries. This diversion from direct routes to indirect routes will result in an annual revenue loss of over $130,000 to the U.S. industry overall.

In addition to the revenue drain to the industry which

occurs by reason of the transfer of traffic from direct circuits to indirect routes, the Commission has long recognized that direct routings improve efficiency and minimize outages. In the past, these considerations have been held to justify expansion of overseas routes by the IRCs and the extension of their operations into new gateway cities.

Thus, the Commission has stated in authorizing route expansion by a carrier:

> "An authorization . . . to provide service . . . on a direct basis rather than an indirect basis . . . should improve efficiency to the extent that traffic no longer must be switched through [a second country's] switching system and be hauled between [a second country and its ultimate destination] over landline facilities."*

Similarly, in authorizing the IRCs to extend their operations into additional gateway cities, the Commission stated that policies which provide more direct routings and less backhauling of traffic promote efficiency and economy. Thus, the Commission stated, "[b]y denying each carriers' customers the opportunity to route traffic to the gateway nearest the individual customer's location, the existing policy fosters inefficient routing."** We believe essentially the same considerations militate against the use of indirect, less efficient routings fostered by the Interim Formula.

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* TRT Telecommunications Corp., 46 F.C.C.2d 1042, 1052 (1974).

** International Record Carriers' Communications, 58 F.C.C.2d 250, 257 (1976).

Moreover, the shift of traffic from existing direct circuits idles these circuits, at least over the short run, and results in a waste in investment both in transmission facilities and in switching plant allocated to handle this traffic. This situation adds to the inefficiencies in traffic handling resulting from the operation of the Interim Formula.

Thus, it cannot be assumed that operations under the Original Formula and the Interim Formula are equally "efficient". Indeed, as shown, the Interim Formula results in some cases in taking traffic away from the most direct, and generally least costly, transmission routes, thereby adding unnecessarily to the burden which must be borne by the U.S. industry and, ultimately, the U.S. ratepayer.

C. The Basis of the Interim Formula Which is Predicated on Increased "Competition" as a Desirable End in Itself is Unsound

RCA Globcom submits that there is no evidence to warrant the Commission's earlier assumption that the construction of an international formula which incorporates conventional concepts of "competition" will improve efficiency and service and lower costs to the public. To the contrary, we submit that increased competition for routings will have no positive impact on service to the public* and, indeed, will raise rather than lower the costs of this service.

The Commission's initial promulgation of the Interim Formula was predicated, in large part, on its

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* It is undisputed that the IRCs' role in the overseas transmission of unrouted traffic filed with Western Union is typically

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preference for increasing competition by the IRCs to turn unrouted traffic into routed traffic. The Commission's reliance on increased competition in the context of a formula change is, we submit, unsound. There is no indication in the prior record -- and we perceive none now -- of how an increased competitive struggle for routings which the Commission envisages will contribute to service improvement or reduce the cost of service to the public.

Rather, the Interim Formula, like the all-routed proposal, has precisely the opposite effect on those primary interests by multiplying solicitation costs. It also results in certain instances, as shown above, in transferring traffic to less efficient, more costly routings. Since the law is clear that the mere assertion of the purported benefits of competition is not enough to sustain a Commission edict (FCC v. RCA Communications, Inc., 346 U.S. 85 (1953); Hawaiian Telephone Co. v. FCC, 498 F.2d 771 (D.C. Cir. 1974)), the burden remains on the proponents of the Interim Formula to show how the competition for telegram routings, which it seeks to promote, will serve a beneficial public interest purpose. This is especially true in light of the fact that the telegram market is a generally declining one.*

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* This decline has been recently documented in the September, 1977 study by Horace J. DePodwin Associates, Inc. on behalf of Graphnet Systems, Inc. in connection with FCC File No. W-P-C-1430.

It would also appear that the Interim Formula in operation produces a result, in practice, which is far from the Commission's apparent intent. It creates incentives which encourage the IRCs to seek to increase their share of "unrouted" traffic, not by pursuing the occasional "hinterland" customer who does not now "route", but by intensifying their solicitation efforts to change the "routings" of large business customers in the "gateways" and other metropolitan centers who already "route."* This is due in large measure to the "bonus" feature of the Interim Formula which rewards a carrier for every routed message with 2 or 3 other messages. We submit that this is inconsistent with the Commission's expressed desire to promote "consumer choice" and thus to achieve "a consequential reduction in unrouted traffic."** It also is indicative of what, we submit, is a lack of understanding of the operations of the telegram market reflected in the Commission's prior orders.

As previously noted, rather than producing discernible benefits, the Interim Formula works to:

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* RCA Globcom Reply Brief to the Court of Appeals, p. 28. Indeed, this is the only policy the IRCs could follow, unless they undertake the major expenditures, discussed at pp. 9-10, supra, necessary to reach the occasional user.

** 57 F.C.C.2d at 215.

((992

(a) Increase substantially marketing expenses associated with the telegram service.

(b) Increase payouts due to increased reliance on indirect routings -- a pure loss to the U.S. companies and ratepayers; and

(c) Produce a short run waste of capacity for the carriers who abruptly lost significant quantities of traffic.

The Commission has not heretofore penetrated the surface plausibility of the Interim Formula. But when superficial appearances are subjected to rigorous analysis, it is plain that the Interim Formula has not served and, if continued, will not serve the public interest.

D. The Interim Formula Is Not Fair As Between the Carriers

Any formula promulgated by the Commission not only must meet "public interest" standards, but also must pass the test of inter-carrier fairness implicit in the statutory standards of "justness", "reasonableness", and "equity". The Interim Formula does not, we submit, pass this test.

The effect of the formula change which became operative last November has been to abruptly shift large blocks of traffic from RCA Globcom to other carriers. There is, we submit no warrant for this action save naked agency fiat.

We do not now suggest, nor have we ever suggested, that the pattern of distribution devised in 1943 is immutable. But that distribution was based, in substance, if not in terms, upon a contract in which both RCA Globcom and the other carriers now asking for a "new deal" bargained away other rights of substance. And, for 30 years, other decisions have been made in light of and in reliance upon that agreement. If that distribution is to be abruptly set at naught, such a decision should only be based on some finding that RCA Globcom has misused or abused the position which it acquired, thereby rendering the operation of that formula "unjust or unreasonable or inequitable or not in the public interest."

On the present record, no such finding is conceivable, let alone appropriate. There is no suggestion that, under the prior formula, RCA Globcom slighted" in any way whatever its telegram service either to those areas where it received the bulk of Western Union's "unrouted" filings or to those areas where some other carrier received the bulk of such filings. In more than 30 years of operation under the prior formula, RCA Globcom served the public faithfully and well -- everywhere.

If the IRCs had been free, since 1943, to "compete" for Western Union's "unrouted" filings and if one hypothesizes

CC994

a "disinterested" choice of forwarding carriers by Western Union, there is no reason to believe that the distribution which would have resulted would have been very different from the one which emerged under the prior formula.

In virtually all cases in which one carrier or another received, under the prior formula, most of the unrouted traffic to a given area, the so-called "favored" carrier is the one which was a leader in the provision of service to that area when the Original Formula came into effect. There is no reason to believe that, in the absence of a formula, the leader would not have been able to build on that leadership. The formula restricted in the public interest the leader, no less than the others.

Indeed, the Interim Formula, by linking the distribution of unrouted traffic nationwide to routed filings, tends to reward efforts which are unrelated to the provision of service to the majority of senders of unrouted traffic. This is because the bulk of the routed filings which, under the Interim Formula, served as the allocation base arise in the few cities designated as "gateways" -- not the "hinterland" which comprises most of the country.

The Interim Formula has, no doubt, a plausible ring to it. But it is, under analysis, fundamentally arbitrary.

The prior formula on the other hand suffers from no such vice. It did not, to be sure, produce the distribution which some carriers now would like. But it is based on contract -- on agreements which ITT Worldcom and TRT now seek to repudiate after they have reaped their benefits from those agreements.

II. The Continuation of the Unjustified Interim Formula Arrangement Exposes RCA Globcom to Unwarranted Losses of Traffic and Revenues

There is little dispute that RCA Globcom is the principal party which has suffered substantial traffic and revenue diversions as a result of the introduction of the Interim Formula.* While RCA Globcom recognizes that the Commission has the statutory authority to change the formula, it can only do so in compliance with the criteria spelled out in Section 222(e)(3) of the Communications Act, viz., that the replacement formula must be shown on an appropriate administrative record to be "just, reasonable, equitable, and in the public interest."

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* RCA Globcom estimates it will lose approximately 400,000 messages in 1977 and substantial unrecoverable revenue from the formula change on outbound traffic alone. Since, as noted, outbound traffic to a major extent affects the the amount of inbound traffic carriers receive from overseas, RCA Globcom expects its total traffic and revenue losses to grow if the Interim Formula remains operative.

As shown at length herein, the Interim Formula clearly fails to meet the four statutory tests. Accordingly, there is no reason to continue to expose RCA Globcom to any injury. As matters now stand, the losses we suffer are being magnified every day the Interim Formula remains in effect. We submit, under the circumstances, that there is no basis in law or equity for continuing to subject the Interim Formula's opponents to further harm, at least until a proper formula in compliance with the statutory directives is adopted and supported "by adequate proof."*

III. Alternative Approaches To Formula Revision Exist Which Will Minimize, If Not Eliminate, Many of the Detrimental Effects of the Interim Formula and Could Be Explored by the FCC in Further Proceedings

The Original Formula has not been shown to be unlawful or to deprive the public of efficient, economical telegram service. But if one assumes, arguendo, that a formula change now is appropriate by reason of the time which has passed since 1943, we submit that methods other than the Interim Formula exist to accomplish this and to do so in a way which would minimize the defects of both the Interim Formula and the all-routed concept.

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* 559 F.2d at 891.

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Along these lines, RCA Globcom suggests that alternative approaches to a revision to the formula, such as those listed below, could be considered in further proceedings in this or another Docket.

A. "Phased-In" Alternative Approach To Formula Revision

RCA Globcom believes that one possible alternative open to the Commission would be a phased-in approach, using a five-year base of total originating continental United States telegrams for each country of destination as reported to the International Quota Bureau (IQB) by each IRC. Since The French Telegraph Cable Company did not participate in the Original Formula, its five-year base telegram information source should be its responses under Section 43.61 of the Commission's Rules. The initial five-year base would cover the period July 1, 1971 to June 30, 1976 for all participating IRCs.

The total of each IRC's telegram volume by country as compared to total volume of telegrams to that country would produce the ratios which are the basis for future distribution of unrouted telegrams originating with Western Union in the continental United States. At each six-month interval, the five-year base would be typically updated as shown below:

Five-Year Base	Will Distribute Unrouted for the Period Shown:
July 1, 1971 to June 30, 1976	January 1 to June 30, 1977
January 1, 1972 to December 31, 1976	July 1 to December 31, 1977
July 1, 1972 to June 30, 1977	January 1 to June 30, 1978
January 1, 1973 to December 31, 1977	July 1 to December 31, 1978

Of necessity, there must be a lag of six months between the last day of the five-year base and the first day of the unrouted period in order to accumulate the necessary telegram volumes and compute the ratios for each country of destination.

The initial five-year base and the first update will be based on total volume of telegrams originating in the United States. Each subsequent six-month update would delete the first six-month period, but will only add the latest six months of routed traffic, i.e., each IRC's direct file telegrams plus Western Union transfers routed by the sending public via the specific IRC.

This alternative would provide whatever long-term benefits (assuming there are any) which may result from the Interim Formula, while reducing the short-term costs. For example, since a company bases its capacity planning on operating experience and projections, the five-year history approximates

the period on which plans would have been based in determining capacity available in 1977. Once these decisions were made, the capacity is essentially fixed for the short-run, and a major change in routing is bound to leave some capacity idled and wasted. This is one of the costs to the industry noted above. However, the phased-in approach proposed here allows the effects of formula revisions to be incorporated in the planning horizons of the firms being impacted, thereby permitting adjustment to reasonably predictable changes and minimizing the short-term waste of capacity.

In addition, the phased-in approach would reduce the loss to the industry in payouts to overseas correspondents due to indirect routing. The phased-in approach would also likely result in less of a surge in marketing expense. It would be more likely to see a gradual increase since the returns from increasing market share (and therefore the incentive to increase marketing expense) would come gradually over a period of time.

B. Limit Competition for "Routed" Traffic to Gateway Cities

RCA Globcom submits that confining the base to the gateways would limit the increased marketing expenses associated with an interim-type formula which is based on competition for

customer routings. Under this proposal, the intensified marketing effort resulting from the formula change would be limited to an area where the IRCs are currently authorized to provide full direct service, maintain offices and where the bulk of their marketing forces are concentrated.

This type of approach was considered by the Commission in the January 7 Order and rejected.* If, however, the Commission believes this concept of "competition" should remain a factor in shaping a new international formula, we submit that it makes much more sense to confine competition for purposes of determining formula allocations to the metropolitan areas where the IRCs operate and have direct contact with the public. We further submit that adoption of expanded gateways in February, 1976,** subsequent to the adoption of the Interim Formula, in this respect equalizes the competitive positions of the IRCs and eliminates to a major extent the concern expressed by TRT, and recognized by the Commission, that TRT's lack of a New York City gateway made such a distribution arrangement unfair to that carrier. At present, all five of the principal IRCs operating in the U.S. participate directly in the New York market.

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* 57 F.C.C.2d at 194, 211.

** International Record Carriers' Communications, 58 F.C.C. 2d 250.

C. Free Direct Access Should Be An Adjunct To Any Formula Change

If the Commission continues to adhere to the view that the benefits of increased competition may outweigh the costs, then we submit that the benefits to be derived from such competition should be pursued consistently.

One major area where such a result can be achieved involves encouraging direct access. Currently, a significant number of messages are routed at additional customer expense to the IRCs via direct access. The fact that customers are willing to incur this additional expense shows that they perceive some benefit in this method of filing message traffic. If anything, this perceived benefit is one of the benefits of a competitive market.

It is quite likely that, if "free" direct access were permitted, a larger fraction of the oversea file would be routed according to customer choice,* reducing the unrouted traffic necessary to allocate, and moving, at the choice of the customer, closer to the "all-routed" concept which the Commission has envisioned. At the same time, a customer would

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* Ironically, the Commission's denial of free access denies the IRCs use of the one method by which they might plausibly hope to "merchandise" their services to scattered "hinterland" senders at reasonable cost.

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make the selection of method of filing message traffic based on his perception of the service offered without an arbitrary and unnecessary added cost of reaching the IRC.

The above-mentioned proposals are not, of course, meant to be all inclusive, and probably more thorough study and analysis by the Commission and the parties would reveal others. They are, however, intended to show that possible "fair and equitable" means of distributing unrouted telegrams, in addition to the one specified in the Original Formula, do exist.

Conclusion

RCA Globcom has demonstrated, we submit, that the Interim Formula fails to meet the statutory tests of justness, reasonableness, equity and public interest. The question which the Court has referred to the Commission can be properly answered only in the negative. The Interim Formula creates unnecessary cost burdens, leads to inefficient traffic handling and has not been shown either to provide at present, or to be likely to provide in the future, any discernible improvement in service to the public. Rather, the Interim Formula is a product of a mistaken conception that increased competition per se is a desirable goal, contrary

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to the accepted judicial standards. Here competition is wasteful of carrier resources and ineffective as a stimulus to improved service.

The Commission, we submit, must confront, at last, the issues that bear upon the strong public interest in the overseas telegraph service any formula will affect and govern. RCA Globcom submits that the public interest is not served by the Interim Formula which:

(i) requires potentially millions of dollars in additional advertising and marketing costs to be incurred by the IRCs;

(ii) may result in the need for increased charges for existing overseas telegraph service;

(iii) requires inefficient traffic handling and diminished use of existing direct circuits;

(iv) requires increased IRC payments from the U.S. share of revenues to foreign administrations at a time when the demand for overseas telegraph service is declining; and

(v) encourages the IRCs to concentrate their efforts on existing customers who already route their traffic.

We also are unaware of any evidence that the Interim Formula has noticeably reduced the volume of unrouted telegraph traffic or caused the IRCs to act in a manner which would have this effect.

We urge, therefore, that the Commission advise the Court that the Interim Formula has no proper basis and that the Original Formula should be restored, pending such further efforts as the Commission may choose to make to develop a replacement for the Original Formula which does meet the standards of Communications Act § 222(e)(3).

The Commission should recognize that it has severely damaged RCA Globcom by its decisions of 1976 which the Court of Appeals has found, at the very least, to be unwarranted in significant part. It is not, we submit, fair or just for the Commission to view its present task as one of merely searching for another rationalization for the Interim Formula. It should not seek to sustain that formula and continue it in effect absent the clearest demonstration that the formula meets the tests of the governing statute.

We think it plain that such a demonstration is impossible. The Interim Formula harms the public's interest in an efficient, economical overseas telegram service, and

it is unjust in its effects upon RCA Globcom. The Commission should advise the Court that it has concluded, upon further consideration, that the Interim Formula has no proper basis and that it should be stricken while the Commission pursues, if so disposed, such further analysis of the international formula as it deems appropriate.

Respectfully submitted,

RCA GLOBAL COMMUNICATIONS, INC.

/s/ Francis J. DeRosa

/s/ Charles M. Lehrhaupt

Its Attorneys
60 Broad Street
New York, New York 10004

November 7, 1977

ATTACHMENT A

Destination	Direct Route IRC	Direct Route Per Msg	Indirect Route IRC	Indirect Route Per Msg	Jan.-June '77 Unrouted Transfers	Gain or Loss to Industry
Argentina	WUI	$ 6.58	TRT	$ 6.50	666	$ 53
Bolivia	WUI	5.53	TRT	7.58	343	(703)
Chile	WUI	5.45	TRT	6.23	358	(280)
Denmark	ITT	2.63	TRT	7.99	162	(868)
France	WUI	4.79	TRT	7.51	1,114	(3,030)
Greece	RCA	4.72	TRT	5.22	361	(181)
Honduras	ITT	6.18	WUI	5.47	748	531
India	RCA	2.46	TRT	5.33	694	(1,992)
Ivory Coast	RCA	11.68	TRT	15.81	25	(103)
Japan	RCA	4.45	WUI	7.91	12,984	(44,925)
Martinique	WUI	4.16	TRT	4.00	96	15
Morocco	RCA	5.30	TRT	7.36	32	(66)
Netherlands	WUI	3.35	TRT	5.76	605	(1,458)
Neth. Antilles	WUI	4.21	TRT	3.79	290	(122)
New Zealand	RCA	2.88	WUI	3.70	3,088	(2,532)
Norway	RCA	5.45	TRT	5.65	241	(48)
Pakistan	RCA	2.89	WUI	5.28	3,709	(8,865)
Peru	WUI	5.20	TRT	5.56	493	(177)
Spain	RCA	4.66	TRT	4.68	897	(18)
Tunisia	RCA	5.56	WUI	7.24	90	(151)
Zaire	RCA	8.51	ITT	11.65	236	(741)
			Totals		27,232	(65,661)
					Annualized	($131,322)

Source: (1) Average Payout Per Message to respective countries as reported under Part 43.61 of the FCC's Rules for year 1976.

(2) Direct Route, Taken from Dec. '75 thru Feb. '76, 13-week traffic survey.

(3) Indirect Route, Taken from 1975 FCC Routing Guide List.

A F F I D A V I T

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

Robert J. Angliss, being first duly sworn, deposes and says:

I am Executive Vice President, Switched Services of RCA Global Communications, Inc. I have read the facts stated in the foregoing "Comments of RCA Global Communications, Inc. on Remand" and know the contents thereof. Except for the facts of which official notice may be taken, all such facts are true and correct to the best of my personal knowledge, information and belief.

/s/
Robert J. Angliss

Subscribed and sworn to before
me this 7th day of November, 1977.

_____

CERTIFICATE OF SERVICE

I, Phyllis M. Hurley, hereby certify that on this 7th day of November, 1977, I mailed a copy of the foregoing document (including the Comments of RCA Global Communications, Inc. and an affidavit of Robert J. Angliss) by United States mail, postage prepaid, to the following:

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Chief, Common Carrier Bureau
Federal Communications Commission
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Washington, D. C. 20554

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Stephen S. Melnikoff, Esq.
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Hon. Griffin Bell
Attorney General of the U. S.
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Attorney for Intervenor,
TRT Telecommunications Corporation

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
International Record Carriers' Scope of Operations in the Continental United States Including Possible Revisions to the Formula Prescribed Under Section 222 of the Communications Act.	)	File No. 19660

To: The Commission

COMMENTS OF
WESTERN UNION INTERNATIONAL, INC.

Western Union International, Inc. (WUI) hereby submits its Comments in response to the invitation contained in the Commission's letter of October 7, 1977. The United States Court of Appeals for the Second Circuit remanded this proceeding to the Commission to determine "whether the promulgation of the 'interim formula' has, in the opinion of the FCC, a factual basis in the record independent of the FCC's tentative preference for an all-routed system".*

WUI believes that the record in this case falls far short of being sufficient to support the promulgation of the interim formula.

It is a matter of elementary administrative law that an agency must specify the reasons for its decisions,

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*RCA Global Communications, Inc. v. FCC, Docket No. 76-4054, Slip Opinion decided OCtober 5, 1977, pp. 4-5.

which must be adequately sustained in the record. See, e.g., SEC v. Chenery Corp., 318 U.S. 80 (1943); Davis, Administrative Law Treatise, §16.12. Viewed in this light, the Commission's justification for the adoption of the specific solution to problems which it saw in the original formula is clearly insufficient.

When an agency determines to change an existing policy or rule -- i.e. the original formula -- it has an obligation to spell out its reasons for change in greater detail than when promulgating the initial rule. The Court of Appeals has recently ruled that:

> "Here the Commission is seeking to change its policy, and, as held in Columbia Broadcasting System, Inc. v. FCC, 147 U.S. App. D.C. 175, 454 F.2d 1018, 1026 (1971), such changes in policy must be rationally and explicitly justified in order to assure 'that the standard is being changed and not ignored, and...that [the agency] is faithful and not indifferent to the rule of law.'...There must be a thorough and comprehensible statement of the reasons for the decision, see Administrative Procedure Act §4(b), 5 U.S.C. §553(c); National Nutritional Foods Association v. Weinberger, 512 F. 2d 688, 701 (2d Cir.), cert. denied, 423 U.S. 827, 96 S. Ct. 44, 46 L. Ed. 2d 44 (1975). In this case, therefore, the FCC did not have the leeway that may be given an agency in the initial promulgation of cut-off criteria for the applicability of regulations. We deal here with a change in such criteria, and hence we must find that the FCC had a rational, articulated explanation for its action in order to uphold its decision." United Church of Christ v. FCC, 560 F. 2d 529, 532-3 (2d Cir. 1977).

In this case, the Court set aside an FCC decision changing the threshold for the application of certain

equal employment opportunity programs, stating that:

> "Thus, in every particular, the FCC has failed to articulate a reasoned explanation for its action It cannot alter its regulation until it does so." Id. at 535.

In light of the foregoing, it is apparent that the Commission's stated reasons for adoption of the interim formula are insufficient. In the Commission's lengthy decision herein released January 7, 1976, 57 FCC 2d 190 (1976), there is but a single paragraph, No. 48, setting out the Commission's reasons for adopting the interim formula, as opposed to any other possible solution to the supposed problems of the then existing formula.* In summary, the Commission asserts that it has "sought to eliminate complexities which have made the present formula difficult to administer and a source of controversy". 57 FCC 2d at 210. The Commission also states that its adoption of the interim formula "will also eliminate the chief cause of the distortions in the present distribution and will prevent future accumulation of overages and deficiencies." Finally, the Commission refers to the periodic adjustments of quotas. WUI submits that none of these reasons can be rationally supported by the evidence of record.

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*Four subsequent paragraphs deal with details of the implementation of the interim formula.

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A significant omission from the Commission's justification for the interim formula is any assertion that the public interest would be significantly advanced by a change in the formula. It was asserted by the parties defending the original formula, and conceded by the parties seeking change, that the public filing cablegrams would not be affected. The Court apparently also was of this view, and stated that:

> "...there seems to be no contention that... detriment is being suffered by the public from operations under the old or new formulas". RCA Global Communications, Inc. v. FCC, Slip Op. p. 3.

The Commission's adoption of the interim formula can be rationally supported only on the basis that the record contains evidence demonstrating that the original formula "is or will be unjust, unreasonable or inequitable," and that the interim formula will be just, reasonable and equitable (§222(e)(3) of the Communications Act of 1934). WUI submits that the record does not contain such a demonstration. In view of the Court suggestion that the basis of the interim formula be considered, WUI's Comments will focus on the second of the foregoing requirements.

The Commission does not justify the interim formula as having merit in itself, but only that it will eliminate the "complexities" which made the original formula difficult

to administer and a source of controversy. There is no evidence of record that these "complexities" created any hardships in the administration. The fact that it had been effectively administered for decades indicates that the original formula performed its functions adequately. There is no evidence to show that any insurmountable practical problems developed as a result of the formula*.

The Commission also urges that the interim formula will eliminate "distortions in the present distribution". The Commission's reference to distortion implies that there is some true distribution which is somehow more perfect than the actual distribution resulting from the original formula.** There are certainly no grounds contained in the record to determine what a "perfect" distribution might be, and the mere allegation of distortion is insufficient to support the Commission's annulment of this formula and promulgation of the interim formula.

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*WUTelCo did not consider the formula too complex to administer, and in fact had embarked on a program of computerizing the formula to make its operation even more efficient.

**To "distort" is defined as "to twist out of the true meaning or proportion". Webster's Seventh New Collegiate Dictionary, G.C. Merriam Co. 1971.

Although the Commission's attempted justification of the interim formula did not specify what "distortions" would be eliminated, one may speculate as to their nature, based on the Commission's criticism of the then existing formula. One of the main alleged defects is that the manner of distribution of traffic to nonexclusive subareas results in a "disincentive" (defined in the dictionary as a "deterrent") to improved service. This "disincentive" supposedly results from the fact that in these subareas, a gain of a routed message would lead to a loss of an unrouted message. The Commission noted that

> "[ITT] argued that the disincentive discouraged improvements in quality. This is precisely what concerns us about the present pattern of distribution. We cannot ignore the possibility that quality of service could have been improved absent the inequities of the formula". 57 FCC 2d at 202 (emphasis supplied).

Yet there is no rebuttal in the record to WUI's showing that only 11.7% of the outbound traffic is subject to this "balancing" provision, and that no carrier could or would allow service quality to stagnate, jeopardizing 88% of its traffic, simply on the grounds that 12% would not be affected.* See WUI's Supplemental Comments dated August 1, 1975, pp. 14-15.

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*The Commission attempted to deal with this point by noting that"the reason little traffic is subject to proportionate distribution is that for most destinations one carrier receives all unrouted traffic". 57 FCC 2d at 202. This tautological assertion of course does not even touch upon WUI's point that the original formula did not in fact lead to a "disincentive" to improved service.

In its pleadings, WUI pointed out that the large shift of traffic from one carrier to another caused by adoption of the interim formula would leave the carrier losing traffic with substantial unused switching and transmission capacity, and could overload the recipient carrier's facilities, leading to a reduced quality of service.* The Commission's adoption of the interim formula assumed sub silentio that these dual effects would not cause significant problems; but there is no basis whatever in the record for this assumption. Indeed the interim formula flouts the Commission's warning to carriers that

> "...we expect them to utilize their investment in the most economical, cost efficient manner in order to generate sufficient revenues to cover their embedded costs. [Citation omitted]" Memorandum Opinion and Order, AT&T Series 1000, Docket No. 21417, released October 21, 1977, p. 2.

The Commission's brief Conclusions stating its reasons for abandoning the original formula, in Paragraphs 42 and 43, do not contain specific findings of harm either to the carriers or to the public. Indeed the Commission admits that "...it is apparent that, like the effect on the public, the effects on the carriers of the matters considered above [the alleged defects of the original formula] are impossible of concrete quantification." 57 FCC 2d at 208. The Commission asserts that both

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*Supplemental Comments dated August 1, 1975, p. 16-17.

individual carriers and the public have been harmed, citing only the "balancing" provisions discussed above, and "the formula's arbitrary disregard of the public's role". 57 FCC 2d 209. Of course the original formula always permitted the public to route its traffic and so did not disregard the public's role.

There is no support in the record for any conclusion that the interim formula would lead to increased competition in soliciting traffic. As the affidavit of WUI's Vice President, Sales, annexed hereto as Attachment A, makes clear, WUI has not changed its sales solicitation efforts as a result of the interim formula.

Conclusion

The Commission's decisions to abrogate the original formula and impose the interim formula are not supported by the thorough and comprehensible statement of their reasons, required by the Second Circuit in United Church of Christ v. FCC, supra, and are devoid of any factual basis in the record. Accordingly, WUI respectfully submits that the original 1943 formula should be reinstated, at least until

such time as an ultimate formula can be promulgated following the conclusion of an appropriate proceeding.

Respectfully submitted,

WESTERN UNION INTERNATIONAL, INC.

By: Roger P. Newell
Senior Attorney

One WUI Plaza
New York, New York 10004

Dated: November 7, 1977

ATTACHMENT A

State of New York :
: S.S.
County of New York :

Melvin M. Lovell, being duly sworn, deposes and says:

1. I am Vice President, Sales, of Western Union International, Inc. (WUI). I submit this affidavit in support of the Comments of WUI urging reinstatement of the International Formula which was in effect until November 13, 1976 (the original Formula).

2. My experience in the selling of purely international communications services dates back to the year 1959 when I was transferred from the domesitc sales activity of the Western Union Telegraph Company to its Cable Division's hinterland sales force. I served as a Regional Sales Manager from 1959 to 1967 with the years 1963-1967 being as an employee of WUI, the divested successor to the Cable Division. In 1967 I was transferred to New York as WUI's General Sales Manager and in 1971 I was appointed Vice President, Sales, the position I hold at the present time. In my present capacity I am responsible for the selling of all communications service in the continental United States.

3. My background has given me an intimate knowledge of WUI's efforts through the years to solicit routed telegram traffic and in addition I am aware of the activities of WUI's competitors to capture as large a share of this market as possible. Briefly stated, this type of solicitation involves the convincing of customers who have been filing unrouted traffic to use the routing indicator of the carriers of their choice. In addition, customers routing traffic via one or more competitive carriers are urged to change the routing to the carrier doing the soliciting.

4. Without qualification I can state that the intensity of competition in terms of selling and marketing activities and service offerings was no less under the original Formula than they are under the Interim Formula in effect pursuant to the Commission's Report and Order and Notice of Proposed Rulemaking, Docket No. 19660, released January 7, 1976.

5. There were various reasons for the mentioned degree of competition under the original Formula. Although my primary concern has been with the sale of U.S. originating services, I was fully aware that the routed outbound traffic, which generally is business oriented, created opportunity for the generation of inbound traffic. Further, to those many destinations for which WUI had no quota, routed traffic

was our only source of outbound messages. Moreover we recognize that a satisfied user of telegram service would be more likely to avail himself of WUI's other services such as telex and leased channel. Finally, I was aware that to most destinations, each additional routed message obtained by WUI resulted in a net addition to WUI's traffic, both directly and as a result of return (inbound) traffic. Thus we have had every reason to maximize in all possible ways our share of the industry's routed traffic.

Melvin M. Lovell

Sworn to before me
this 7th day of November,
1977

Notary Public

CERTIFICATE OF SERVICE

I, Mary Chin, do hereby certify that a copy of the foregoing pleading of Western Union International, Inc. has been sent by United States mail, postage prepaid, to the following:

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Director, Defense Communications Agency
Commercial Communications Policy Office - Code 108
Attn: J. Randolph MacPherson, Trial Attorney
Washington, D.C. 20305

Mary Chin

Dated: November 7, 1977

BEFORE THE

Federal Communications Commission

WASHINGTON, D.C. 20554

In the Matter of	)	
	)	
International Record Carriers' Scope of Operations in the Continental United States, Including Possible Revisions to the Formula Prescribed Under Section 222 of the Communications Act.	)	Docket No. 19660 RM-690

To: The Commission

COMMENTS OF ITT WORLD COMMUNICATIONS INC.

ITT World Communications Inc. (ITT Worldcom) hereby submits its comments, in response to the Commission's letter of October 7, 1977, respecting the further proceedings in the above captioned proceeding ordered by the Court of Appeals for the Second Circuit in RCA Global Communications, Inc., v. FCC Docket No. 76-4054, Case No. 522.

The issues specified by the Court's remand order are generally concerned with whether the "interim" formula prescribed by the Commission in this proceeding satifies the statutory "public interest" criteria and whether the "all-routed" formula contemplated by the Commission is supported by the record in this proceeding. Hereafter, ITT Worldcom will show that the so called "interim" formula does indeed satisfy all of the statutory criteria of Section 222 of the Communications Act and should

therefore, be prescribed as the formula which the Commission is authorized thereunder to prescribe. ITT Worldcom will also respectfully suggest that the question of whether or not an all-routed formula should ultimately be adopted should be severed from this proceeding and an independent rulemaking undertaken to explore whether or not such a concept would be "just, reasonable, equitable and in the public interest".

By its Report and Order and Notice of Proposed Rulemaking, released January 7, 1976 in the above captioned docket,[1/] the Commission concluded that the formula for the distribution of unrouted international telegraph message traffic originating with the Western Union Telegraph Company (Western Union), which had been prescribed by the Commission in 1943 pursuant to Section 222(e)(1) of the Communications Act, no longer satified the statutory criteria and must be repealed. Thereupon the Commission prescribed a revised formula, pursuant to its duty under Section 222(e)(3), which would cause unrouted traffic to be distributed by Western Union to the various international record carriers (IRCs) in direct proportion to the routed message traffic which each of those IRCs received during a given base period. The revised formula also requires that the base period quotas are to be regularly updated to reflect changing

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1/ International Record Carriers Communications, 57 FCC2d 190.

traffic shares for those IRCs. The Commission also stated its belief that the formula should ultimately evolve into an all-routed distribution system, but, recognizing that the record in this proceeding was insufficient for the prescription of such an all-routed formula, it sought additional comments from interested parties as to the legal, economic and operational implications of such an all-routed approach. Following the issuance by the Commission of its order prescribing the new formula, RCA Global Communications, Inc. (RCA Globcom) sought a stay of that order by the Commission pending judicial review, and Western Union International, Inc. (WUI) sought reconsideration of that order. After considerable deliberation upon the arguments raised by RCA Globcom and WUI in their petitions, the Commission, on September 27, 1976, released its Memorandum Opinion and Order in this docket, wherein it denied the relief requested in each of those petitions and reaffirmed it determination to prescribe the new formula, establishing quotas for unrouted traffic directly proportional to the routed traffic obtained by each IRC during a given base period.

After seeking a stay of the Commission's Order from the United States Court of Appeals for the Second Circuit, and being denied such a stay by the Court, RCA Globcom then sought review on the merits of the Commission's decision from that same Court. On July 27, 1977, the Court issued an opinion in this matter [2/] wherein it found that the

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2/ RCA Global Communications, Inc., v. FCC, 559 F.2d 881 (Second Circuit) Docket 76-4054.

formula prescribed by the Commission had not been supported by adequate findings as to whether or not such a formula was in the "public interest", and, in dicta, strongly assailed the Commission's tentative determination that an all-routed distribution formula would serve the public interest. The Court then ordered the Commission's formula decision vacated and remanded the matter for further proceedings. Following petitions for rehearing of the Court's order by ITT Worldcom, TRT Telecommunications Corporation (TRT) and the Commission, the Court, on October 5, 1977, amended its order so as to stay its mandate insofar as a vacation of the Commission's decision would be required, and provided for a limited remand to the Commission for the purpose of permitting the Commission to address the question of "whether the promulgation of the 'interim' formula has, in the opinion of the FCC a, factual basis in the record independent of the FCC's tentative preference from an all-routed system" and for the purpose of permitting the Commission and interested parties before the Commission to address issues raised by the Court in the light of the 10 months operational experience gained with the new formula.

Following are ITT Worldcom's comments respecting those remand issues, which it hopes will be helpful to the Commission in developing its opinion in response to the Court's remand order.

Section 222(e)(3) of the Act provides that when the Commission finds any formula distribution to be "unjust, unreasonable, or inequitable, or not in the public interest", it shall prescribe a new formula

distribution to be "just, reasonable, equitable, and in the public interest". In its January 7, 1976 Report and Order, the Commission makes extensive documented findings as to the pronounced inequity and unjustness and unreasonableness of the 1943 formula, in the distribution which the 1943 formula then required among the participating IRCs. 3/ Fundamentally the Commission's determinations in this respect are premised upon the strikingly disproportinate share of unrouted traffic which certain carriers received compared to those carriers' shares of the routed traffic pool -- i.e., that traffic in which the sender makes a deliverate choice as to the IRC which should carry his traffic. In ITT Worldcom's view, the Court's opinion does not question the Commission's conclusion that the 1943 formula must be repealed. Indeed the Court's opinion on rehearing actually supports that Commission determination. There, the Court stated:

> "The FCC very properly was entitled to examine the situation in light of the present condition of the industry. Although the purpose of the 1943 formula was to freeze the shares of industry participation because of the potentially unique situation created by the merger, that purpose cannot be stretched to giving RCA a right in perpetuity to a fixed share of the telegraphic market regardless of changing conditions and circumstances. It certainly could not have been the intention of the Congress or the FCC to permit RCA to sit back and do nothing to counteract tactics by its competitiors and reply upon the "formula" to give it the lion's share of the unrouted business."

3/ See particularly paragraph 15 through 24 of that opinion.

Accordingly ITT Worldcom does not believe that any further argument is required respecting the Commission's determination that the 1943 formula must be repealed and, necessarily, a new formula prescribed.

While the Court has found that the Commission's determinations that the new formula would be in the public interest are not supported by the record, it is rather obvious that the Court's real concern here is the Commission's determination in this proceeding that an all-routed formula should ultimately be prescribed, and its characterization of the existing formula as an "interim" formula. In ITT Worldcom's view it was not the Commission's intent to establish an all-routed formula as the formula prescribed in this proceeding and upon this record. ITT Worldcom believes instead that the Commission intended, as it often does in new rulemaking proceedings, to express a tentative preference for a particular concept, in this case an all-routed formula, and to solicit comments and evidence from interested parties as to whether that concept should be adopted by the Commission. After receipt of such comments and evidence, the Commission then would presumably intend to consider the record before it and make a determination at that time as to whether or not such a concept should, in fact, be adopted by the Commission. It would appear to ITT Worldcom that the Commission, merely as a matter of administrative convenience, chose to express its tentative view, and to invite comments upon that view from interested parties, as part of its Order establishing a new formula upon the record before

it in this docket, rather than issuing a separate rulemaking notice for purposes of expressing its tentative views on the all-routed formula and soliciation of comments and evidence thereon. Similarly, ITT Worldcom perceives in the Commission's Order an intent to prescribe the formula which allocates unrouted traffic in proportion to routed traffic, the so called "interim" formula, as the formula which it was authorized to and required by Section 222 to prescribe upon the record before it at that time.

Nonetheless, the Commission's decision to announce its new inquiry, as to the feasibility of an all-routed formula, in its opinion on this record and to characterize the formula which it did prescribe based upon this record as an "interim" formula, has clearly distrubed the Court of Appeals and caused it to conclude that the Commission's decision is not adequately supported by this record. ITT Worldcom therefore respectfully urges that the Commission, in its opinion on remand, make clear to the Court that the existing formula -- i.e., the formula which allocates unrouted traffic in direct proportion to each IRCs routed share during a given base period -- is the formula, and the only formula which the Commission intended to prescribe based on the record before it. The Commission should also advise the Court that it intends to sever the question of an all-routed formula from this proceeding and establish an entirely separate rulemaking proceeding for that proposal. Alternatively, in view of the nearly unanimous oppostion

(1930

from all of the IRCs and Western Union to the Commission's suggestion of an all routed formula,[4/] and of the strong criticism of that approach in the Court's dicta, the Commission may wish to simply terminate the proceeding respecting the possible adoption of an all-routed formula.

As already noted, the principal thrust of the Court's objection to the formula decision was directed at the Commission's all-routed formula proposal. On the other hand, the Court's only substantive objection to the new proportionate distribution ("interim") formula is found in its determination that the Commission has not adequately supported the conclusion that this formula is required by the public interest. In its opinion on rehearing, the Court stated;

> "We did not find that the formula [the 'interim'] was in, or not in, the public interest. There simply was no proof that related it to the public interest in any way."

4/ The single IRC supporting that approach had such an obvious parochial interest in taking this position that its dissent should be given little weight.

ITT Worldcom is concerned that the concerned IRCs and the Commission have simply failed to adequately explain the public interest basis for the new formula to the Court. The allocation basis of the new formula, which established quotas for unrouted traffic proportionate to each carrier's share of customer routed traffic with those quotas being revised biannually to reflect changes in routed traffic shares, clearly reflects a public interest improvement over the 1943 formula. Whereas the 1943 formula actually created a strong disincentive for any carrier to try to improve its overseas message service, toward the expectation of an increase in customer routed traffic, the new formula provides a positive incentive for such efforts. Since the new formula rewards a carrier with unrouted traffic from Western Union, in direct proportion to that carrier's success in attracting specifically routed traffic to its system, a substantial stimulus is created for that carrier to increase its share of routed traffic.

As the Court must recognize, the logical means for increasing a carrier's share of customer routed traffic is to make that carrier's service ever more attractive to the public, primarily through the use of service enhancements or improvements. As an example of the manner in which this incentive does work, and hopefully as an aid to the Commission in support of its finding that such incentives would be created and that the public interest would thereby be served, ITT Worldcom has attached to

to these comments an affidavit of John B. McKinney describing significant service improvements which ITT Worldcom has undertaken since this new formula was adopted by the Commission and, at least in part, in response to the incentives created by that formula.

Additionally, in terms of the public interest, the new formula is administratively much simpler than the repealed 1943 formula. Thus, there will be substantially less chance for error on the part of the International Quota Bureau (IQB) or Western Union in calculating quotas on distributing traffic pursuant to this formula. Moreover, since Western Union has been able to automate the distribution of unrouted traffic pursuant to the new formula, an effort which was undertaken primarily as a result of the adoption of the new formula, the unrouted traffic can now be distributed faster and more efficiently and, ultimately, at lower costs to the carriers for that distribution function. This automation will also permit the revised quotas to be quickly and reliably implemented by Western Union.

Although ITT Worldcom strongly believes that the new formula represents a substantial public interest improvement over the 1943 formula, and urges the Commission to so find in its order on remand, it cannot ignore the Court's statement in the rehearing opinion that:

> "It may well be that 'public interest' is not a necessary factor to be considered in view of the fact that there seems to be no contention that the best-known technological methods of transmission are not being used and that no detriment is being suffered by the public from operations under the old or new formulas".

The Court's reasoning here is presumably premised on the fact that the formula which the Commission is required to prescribe pursuant to Section 222 is simply addressed to the necessity for an allocation of a particular segment of traffic among carriers which are capable of handling that traffic. Thus the primary responsibility of the Commission can be said to be the development of a formula which provides a fair allocation of that traffic among each of the carriers participating in that distribution.

Therefore ITT Worldcom respectfully suggests that the Commission give added emphasis in its opinion on remand to the manner in which the new formula satisfies the criteria of Section 222 that such a formula be "just, reasonable and equitable". ITT Worldcom submits that the record and the 10 months of operating experience pursuant to this new formula clearly support the Commission's conclusions in this regard.

The new formula which the Commission has prescribed allocates the unrouted traffic filed with Western Union in accordance with quotas derived from the percentage share which each carrier receives of the traffic which has been specifically routed via a particular IRC by the user. These quotas are updated to reflect current routed traffic dis-

tributions every six months. Thus, the traffic filed by those users who express no preference as to the international carrier which will carry their traffic is allocated among the IRCs in the same proportion as for the traffic which those IRCs have been successful in attracting from among those users which do concern themselves with the IRC which carries their traffic. That such a distribution is, on its face, "just, reasonable and equitable" seems beyond argument. Indeed, nowhere in either of its opinions does the Court challenge this formula as not meeting those criteria, or even suggest that the Commission's opinion is not adequately supported in its finding in this regard.

During the 10 months in which that formula has been in operation, this allocation methodology has clearly worked, in the sense that unrouted traffic has indeed been distributed by Western Union in accordance with the quotas established pursuant to the new formula by the IQB. There have been no unresolved objections by any carrier to the quotas which were so established by the IQB, and to the best of ITT Worldcom's information and belief no complaints have been made by any carrier as to the distribution of traffic by Western Union pursuant to those quotas.

In accordance with the requirement of the new formula, the IQB has recently computed new quotas based upon each carrier's routed traffic percentage for the period January through June 1977, which quotas

are for use in distributing unrouted traffic during the period January through June 1978. A copy of the IQB calculated quotas for all destinations and all carriers is attached hereto as Appendix I. It is ITT Worldcom's understanding that a copy of the underlying data upon which those quotas have been calculated by the IQB was furnished to the Commission's New York regional office, and ITT Worldcom therefore requests the Commission to take official notice of that document, to the extent those data may be useful to the Commission in preparing its opinion on remand.

It is interesting to note with respect to the new quotas which the IQB has recently prepared that they provide a vivid illustration of the soundness and fairness of the new formula. Not only do those quotas reflect the fact that this formula does maintain such quotas concurrent with existing routed-traffic market shares, they reflect the dynamics of the IRCs' marketing efforts, and the fairness and equitableness of requiring that those quotas be maintained on a basis current with each carrier's changing market share. Comparison of those new quotas (at least on an "All Destinations" basis) with the percentages shown in column 3 of Table 2 in the Commission's Report and Order (which percentages are approximately equal to initial quotas for the new formula) shows that there have been significant changes in the percentages of routed traffic carried by each of the IRCs during the time period since the determination of the initial quotas. Some carriers have increased their routed traffic percentage, while others have lost some of their prior

routed-traffic share. Those carriers which have increased their share of routed traffic, presumably through improved service to the public, will properly be rewarded with an increased share of the unrouted traffic. On the other hand, those carriers, which have seen their quotas reduced with these quota revisions, can be expected to redouble their efforts to improve their routed-traffic share at the next quota revision. In ITT Worldcom's case, it believes that its efforts described in its hereinbefore referenced affidavit, which have only recently become fully effective, will in fact result in an increase in its routed traffic share during the next quota period, but it will be exploring other avenues during this period by which it can encourage still more users to route their traffic via its facilities. The important point, however, is that all carriers have an opportunity, on a relatively short term basis, to increase their share of unrouted traffic by increasing their market share of routed traffic.

Finally, with respect to the predictable argument on the part of RCA Globcom that the revised formula shifts substantial revenues away from it, ITT Worldcom submits that this argument is simply irrelevant to the issues before the Commission here. No purpose would be served by engaging in a debate with RCA Globcom as to whether or not the amount which it chooses to characterize as its revenue loss from the new formula is or is not based upon realistic calculations and judgments. There

is no serious dispute that the revised formula does, in fact, shift revenues away from RCA Globcom, and the simple answer, as to its relative magnitude, is that however large the maximum amount is, it reflects only the long overdue revision of the 1943 formula. The Commission has prescribed a formula which presently allocates unrouted traffic among the IRCs in a "just, reasonable and equitable" manner. If RCA Globcom's alleged revenue loss is in fact accurate, it can simply be said that this also represents the amount of a windfall which RCA has been receiving for an extended period of time since the 1943 formula last effected an allocation which was "just, reasonable and equitable". RCA can hardly make an equitable claim of damage from its sudden loss of perhaps substantial revenues as a result of the prescription of the new formula, when it has for so many years enjoyed, without complaint, the windfall increase in revenues which have resulted from the progressively more unbalanced distribution of unrouted traffic in favor of RCA under the 1943 formula. As the Court itself observed, in its rehearing opinion, respecting the RCA claim of a revenue loss from the new formula:

> "But the 1943 formula did not create a contract in perpetuity apportioning revenues and did not relieve the FCC of its statutory duty to prescribe a 'just, reasonable, equitable and in the public interest' formula".

(1038

In conclusion, ITT Worldcom respectfully submits that the Commission should, in its response to the Court of Appeals remand order, sever its consideration of an all-routed formula approach from this proceeding (or terminate its investigation into the possibility of prescribing such a formula) and prescribe the heretofore characterized "interim" formula as the formula prescribed pursuant to Section 222 of the Communications Act upon the record before it in this proceeding. ITT Worldcom further suggests that the Commission, having already determined, in a conclusion unchallenged by the Court, that the 1943 formula was producing a seriously inequitable distribution of unrouted traffic among the IRCs and thus must be repealed, should again find that the new formula provides a significant improvement for the public interest and should also emphasize its findings that this formula produces an allocation of unrouted traffic which is clearly "just, reasonable and equitable." Clearly, both the record before the Commission at the time of its formula order, and the operating experience obtained to date with the new formula will sustain a finding that this formula satisfies those criteria.

Respectfully submitted,

ITT World Communications Inc.

BY: Joseph J. Jacobs

John A. Ligon
Its Attorneys

Dated: November 7, 1977

AFFIDAVIT OF JOHN B. MCKINNEY

I, John B. McKinney, the undersigned, being duly sworn depose and say:

1. That I am Executive Vice President and General Manager of ITT World Communications Inc.

2. That subsequent to the release in January of 1976 of the FCC's Report and Order prescribing a new formula for the distribution of unrouted traffic filed with the Western Union Telegraph Company, which formula allocates such unrouted traffic in direct proportion to each IRCs percentage share of customer routed traffic, ITT Worldcom undertook a program of improvements in its overseas message service, as specified in the subparagraphs following, with the goal of increasing its share of routed message traffic and thereby also increasing its share of unrouted traffic pursuant to the revised formula. Although ITT Worldcom is continually engaged in a program to improve and upgrade all of its communications services, and it is possible that some or all of the improvements in ITT Worldcom's overseas message service which are set forth hereafter would have been implemented without the incentive provided by the revised formula, I am of the opinion that, but for the

C1041

incentive provided by that formula, much of the allocation of revenues and manpower which went toward improvements in ITT Worldcom's message service might well have been channeled to other services for which greater demand exists, and thus that these improvements in message service may not have occurred as rapidly as they did under the incentive provided by the revised formula. The major improvements in ITT Worldcom's overseas message service, to which I have referred, are as follows:

A. During the middle of 1976 ITT Worldcom began efforts to substantially upgrade and improve its international message switch. The first phase of this new duplex international message switch was installed and placed into service in June, 1977. This new switch, which uses the latest state of art integrated circuits in place of the discrete components of our former system, provides a hot stand-by capability to enhance reliability and access time for customer transmissions. This first phase improvement increased the in-service time for the message switch from

approximately 95% to 98.5%, and when the full duplex capability has been completed by the end of 1977, the in service time for the switch is expected to be 99.9%.

B. In July of 1977, we provided, in the new message switch, greatly expanded pilot code tables to permit automatic processing of virtually all routed and unrouted traffic from the Western Union system.

C. In September of 1976, we provided a full speed interface for West Coast TWX subscribers of Western Union wishing to file their message traffic directly with ITT Worldcom. This change permitted a 50% decrease in the customer's transmission time. A similar capability is presently being provided for the east coast TWX subscribers and is scheduled to go into service by January of 1978.

D. During 1976 we instituted a new customer service pursuant to which a group of trained personnel are available 12 hours every day to answer questions from customers located anywhere in the 48 states as to how to send a message, either directly via their telex or TWX

machines or via the Western Union system, to answer questions about rates, to provide assistance in tracing a message, or to address problems which those customers may have. Access to this service is via an "300" inbound WATS number so that the service is available to any user anywhere in the country without cost.

E. In July of 1977, we greatly expanded the on-line message storage capability of the message switch from the former storage limit of one-half day of on-line traffic to approximately 30 days storage of such traffic at present. At the same time, this change provided virtually instaneous on-line retrievals for this traffic. Retrieval time is now 2 seconds, as opposed to the formerly variable time, which, dependant on load, could run from minutes to hours.

F. In September of 1977, we undertook steps to speed up operator processing for messages filed with ITT Worldcom by telephone.

G. In November of 1977, we made facility changes which improve access for all of our gateway subscribers and for all Western Union telex and TWX originated traffic into the new message switch.

III. That these changes have substantially improved the quality of ITT Worldcom's overseas message service to the users, and we are confident that we will in due course see an improvement in our share of routed traffic as a result of such improvements.

John B. McKinney

State of New York)
) ss:
County of New York)

Subscribed and sworn to me before me this 7th day of November 1977.

JONATHAN B. LEVINE
Notary Public, State of New York
No. 31-2330260
Qualified in New York County
Commission Expires March 30, 1977

APPEXDIX I

C1046

INTERNATIONAL QUOTA BUREAU

26 BROADWAY, NEW YORK, N. Y. 10004

Telephone
OCT 2 [illegible]

OPERATING FOR THE INTERNATIONAL FORMULA COMMITTEE REPRESENTING:
FRENCH TELEGRAPH CABLE COMPANY • ITT WORLD COMMUNICATIONS INC. • RCA GLOBAL COMMUNICATIONS, INC.
TRT TELECOMMUNICATIONS CORPORATION • UNITED STATES-LIBERIA RADIO CORPORATION
WESTERN UNION INTERNATIONAL, INC.

JJJ	
JDL	
TJF	
[illegible]	
TC	
ML	
RJH	

Memorandum for:

October 20, 1977

Mr. R. O. Brooks, United States-Liberia Radio Corporation
Mr. J. R. Moman, TRT Telecommunications Corporation
Mr. E. W. Peterson, RCA Global Communications, Inc.
Mr. R. H. Thomas, Western Union International, Inc.
Mr. R. Treglos, French Telegraph Cable Company
Mr. W. S. Wheatley, Jr., ITT World Communications Inc.

389. FCC Docket No. 19660.

1) The accompanying 8-page tabulation of quota percentages based on routed messages as shown in the IQB report for January-June 1977, issued on September 20, 1977, is submitted to you preparatory to formal communication of changes in the distribution of unrouted messages by Western Union effective January 1, 1978.

2) In the six-month period January-June 1977 no routed messages were reported to the following destinations: Pitcairn Island, Wake Island and Willis Islets. It is recalled that in the absence of routed messages to certain destinations in the initial 13 week study, percentages based upon the total messages for all destinations were used.

3) As reference to pages 145 and 180 of the January-June 1977 report will disclose, 1,301 unrouted transfers are reported to Samoa Islands (American) and no unrouted transfers are reported to Western Samoa. Noting the pickups and routed transfers reported to these destinations in the period, it is suggested that this circumstance be referred by the Bureau to Western Union for examination, against the possibility that certain sub-set destinations proper to Western Samoa are being reported by Western Union to Samoa Islands (American).

4) Your directions regarding the timely transmittal of the 8-page tabulation, and the matters discussed in items 2 and 3 above, are requested. Thank you.

John M. Munroe, Manager

Copy for: Mr. R. G. Brolly, ITT World Communications Inc.
Mr. J. J. Celentano, RCA Global Communications, Inc.
Mr. F. R. Conrad, Western Union International, Inc.
Mr. D. C. Jacquet, French Telegraph Cable Company
Mr. T. J. Reilly, Federal Communications Commission
Mr. J. Wiesel, French Telegraph Cable Company

C1047

INTERNATIONAL QUOTA BUREAU

INTERIM FORMULA QUOTA PERCENTAGES BASED ON ROUTED MESSAGES AS SHOWN IN THE JANUARY-JUNE 1977 REPORT ISSUED SEPTEMBER 20, 1977 APPLICABLE TO THE PERIOD JANUARY-JUNE 1978

DESTINATION	FTC	ITT	RCA	TRT	WUI
Afghanistan	3	35	34	4	24
Albania	3	42	28	4	23
Algeria	7	25	36	7	25
Angola	8	22	34	5	31
Arabia	5	26	36	5	28
Argentina	1	34	23	9	33
Ascension Island		33			67
Australia	1	25	35	3	36
Austria	1	26	34	4	35
Azores		39	35	1	25
Bahama Islands	1	28	28	6	37
Bangladesh	4	22	44	4	26
Belgium	3	30	34	3	30
Belize	2	32	19	16	31
Benin	30	16	30	4	20
Bermuda	2	27	30	6	35
Bolivia	1	34	28	9	28
Botswana	6	22	38	4	30
Brazil	1	37	24	8	30
British West Indies	1	28	23	7	41
Brunei	3	15	47	3	32
Bulgaria	1	34	31	4	30
Burma	3	19	42	6	30
Burundi	7	14	47	4	28

INTERNATIONAL QUOTA BUREAU

(1048

INTERIM FORMULA QUOTA PERCENTAGES BASED ON ROUTED MESSAGES AS SHOWN IN THE JANUARY-JUNE 1977 REPORT ISSUED SEPTEMBER 20, 1977
APPLICABLE TO THE PERIOD JANUARY-JUNE 1978

DESTINATION	FTC	ITT	RCA	TRT	WUI
Cameroon	24	22	31	4	19
Canal Zone - Panama	1	29	26	14	30
Canary Islands	3		47		50
Cape Verde Islands	17	19	34	5	25
Caroline Islands		18	52	2	28
Central African Republic	18	25	22	4	31
Chad	27	10	39	5	19
Chile	1	31	29	7	32
China		27	44	1	28
Christmas Island			50		50
Colombia	1	31	24	12	32
Comoro Islands	15	20	43	5	17
Congo	10	21	32	18	19
Cook Islands		25	29		46
Costa Rica		32	24	12	32
Cuba		3	2	91	4
Cyprus	3	39	24	6	28
Czechoslovakia	1	29	33	3	34
Denmark	1	31	31	3	34
Dominican Republic		34	27	8	31
Ecuador		33	24	11	32
Egypt	8	27	32	7	26
Equatorial Guinea	14	7	58	1	20
Ethiopia	3	34	28	5	30

(1049

INTERNATIONAL QUOTA BUREAU

INTERIM FORMULA QUOTA PERCENTAGES BASED ON ROUTED MESSAGES AS SHOWN IN THE JANUARY-JUNE 1977 REPORT ISSUED SEPTEMBER 20, 1977 APPLICABLE TO THE PERIOD JANUARY-JUNE 1978

DESTINATION	FTC	ITT	RCA	TRT	WUI
Falkland Islands			40		60
Faroe Islands		9	73	9	9
Fiji Islands	2	25	44	3	26
Finland	2	28	36	3	31
France	8	29	30	3	30
French Guiana	14	26	35	5	20
French Polynesia	1	35	38	3	23
French Southern & Antarctic Territories		100			
French Territories of Afars & Issas	27	24	29	2	18
French West Indies	4	32	26	6	32
Gabon	17	22	37	3	21
Gambia	16	15	38	5	26
Germany	2	30	33	3	32
Ghana	6	32	29	5	28
Gibraltar	1	40	31	2	26
Gilbert Islands	2	6	60	4	28
Great Britain	4	31	29	3	33
Greece	2	26	37	3	32
Greenland		6	36	9	49
Guam Island		25	49		26
Guatemala	1	26	27	12	34
Guinea	20	17	33	6	24
Guyana	1	29	23	11	36
Haiti	2	42	25	7	24

INTERNATIONAL QUOTA BUREAU (1050

INTERIM FORMULA QUOTA PERCENTAGES BASED ON ROUTED MESSAGES AS SHOWN IN THE JANUARY-JUNE 1977 REPORT ISSUED SEPTEMBER 20, 1977 APPLICABLE TO THE PERIOD JANUARY-JUNE 1978

DESTINATION	FTC	ITT	RCA	TRT	USL	WUI
Hawaii		46	33			21
Holland	2	33	32	3		30
Honduras	1	29	25	18		27
Hong Kong		34	41	3		22
Hungary	1	34	26	3		36
Iceland	1	27	40	1		31
India	1	25	38	5		31
Indonesia	1	31	38	3		27
Iran	3	26	36	5		30
Iraq	2	26	30	7		35
Ireland	2	26	26	3		43
Israel	4	27	35	3		31
Italy	3	31	29	3		34
Ivory Coast	13	25	29	6		27
Jamaica	1	27	22	8		42
Japan	1	35	38	3		23
Jordan	3	29	36	9		32
Kenya	2	27	34	4		33
Khmer Republic		5	19	71		5
Korea	1	29	44	4		22
Laos	7	40	41	1		11
Lebanon	9	22	39	8		22
Lesotho	6	27	45	3		19
Liberia	12	16	31	3	22	16

INTERNATIONAL QUOTA BUREAU (1051

INTERIM FORMULA QUOTA PERCENTAGES BASED ON ROUTED MESSAGES AS SHOWN IN THE JANUARY-JUNE 1977 REPORT ISSUED SEPTEMBER 20, 1977 APPLICABLE TO THE PERIOD JANUARY-JUNE 1978

DESTINATION	FTC	ITT	RCA	TRT	WUI
Libya	6	24	26	10	34
Liechtenstein	2	52	25	7	14
Luxembourg	5	34	27	7	27
Macao	3	16	52	4	25
Madeira Islands	1	22	49	1	27
Malagasy	10	27	37	8	18
Malawi	10	31	33	5	21
Malaysia	2	30	37	2	29
Maldive Islands			53		47
Mali	28	13	29	5	25
Malta	5	24	30	3	38
Mariana Islands	1	29	47		23
Marshall Islands		9	73	1	17
Mauritania	25	29	21	12	13
Mauritius Island	8	12	52	3	25
Midway Island			36		64
Morocco	7	24	38	9	22
Mozambique	6	25	38	5	26
Namibia		51	40	9	
Nauru Island		24	50		26
Nepal	12	35	32	2	19
Netherlands Antilles	1	34	24	12	29
New Caledonia	2	45	28	2	23
New Guinea	6	23	45	3	23

INTERIM FORMULA QUOTA PERCENTAGES BASED ON ROUTED MESSAGES AS SHOWN IN THE JANUARY-JUNE 1977 REPORT ISSUED SEPTEMBER 20, 1977 APPLICABLE TO THE PERIOD JANUARY-JUNE 1978

DESTINATION	FTC	ITT	RCA	TRT	WUI
New Hebrides	1	40	27	3	29
New Zealand	1	25	35	3	36
Nicaragua		28	26	14	32
Niger	27	14	27	5	27
Nigeria	6	24	30	6	34
Norfolk Island			100		
Norway	1	26	37	5	31
Pakistan	2	24	39	4	31
Paraguay	1	35	25	6	33
Persian Gulf	4	27	33	6	30
Peru		33	29	9	29
Philippine Islands		36	36	4	24
Pitcairn Island					
Poland	1	25	36	3	35
Portugal	1	30	34	3	32
Portuguese Guinea	26	22	31	9	12
Puerto Rico	1	35	24	7	33
Reunion Island	16	23	28	5	28
Rhodesia	1	20	39	2	38
Roumania	2	26	38	3	31
Rwanda	9	16	45	8	22
St. Helena Island		25	75		
Salvador		29	28	9	34
Samoa Islands (American)		34	47	3	16

INTERNATIONAL QUOTA BUREAU 01953

INTERIM FORMULA QUOTA PERCENTAGES BASED ON ROUTED MESSAGES AS SHOWN IN THE JANUARY-JUNE 1977 REPORT ISSUED SEPTEMBER 20, 1977 APPLICABLE TO THE PERIOD JANUARY-JUNE 1978

DESTINATION	FTC	ITT	RCA	TRT	WUI
Senegal	12	29	34	6	19
Seychelles Islands	2	27	30	1	40
Sierra Leone	11	18	37	3	31
Singapore	1	31	36	3	29
Solomon Islands		14	65	2	19
Somalia	5	18	45	10	22
South Africa	2	29	34	3	32
Spain	2	34	27	7	30
Spanish North African Possessions		3	97		
Sri Lanka	1	28	39	3	29
Sudan	6	34	29	5	26
Surinam	1	41	23	5	30
Swaziland	7	16	39	2	36
Sweden	1	29	34	3	33
Switzerland	3	27	39	2	29
Syria	2	26	38	4	30
Taiwan	1	35	38	4	22
Tanzania	10	23	31	9	27
Thailand	1	25	37	3	34
Timor Island		50	17		33
Togo	20	25	30	2	23
Tonga Islands	1	9	63		27
Tunisia	7	30	27	15	21
Turkey	2	24	38	8	28

INTERNATIONAL QUOTA BUREAU

INTERIM FORMULA QUOTA PERCENTAGES BASED ON ROUTED MESSAGES AS SHOWN IN THE JANUARY-JUNE 1977 REPORT ISSUED SEPTEMBER 20, 1977 APPLICABLE TO THE PERIOD JANUARY-JUNE 1978

DESTINATION	FTC	ITT	RCA	TRT	WUI
Uganda	5	18	41	3	33
U.S.S.R.	2	26	36	3	33
Upper Volta	36	12	23	3	26
Uruguay	1	45	23	5	26
Vatican City		81	17	2	
Venezuela	1	34	24	9	32
Viet Nam	5	35	39	5	16
Virgin Islands		43	25	6	26
Wake Island					
Western Sahara			75		25
Western Samoa	1	23	56		20
Willis Islets					
Yugoslavia	1	21	48	4	26
Zaire	7	22	38	2	31
Zambia	4	20	31	8	37

ALL DESTINATIONS

FTC	2
ITT	29
RCA	32
TRT	8
USL	
WUI	29

CERTIFICATE OF SERVICE

I, Elizabeth M. Moore, hereby certify that on this 7th day of November, 1977, I mailed a copy of the foregoing "Comments" of ITT World Communications Inc. by United States Mail, postage prepaid, to the following persons:

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Elizabeth M. Moore

Before the
FEDERAL COMMUNICATIOMS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
International Record Carriers' Scope of Operations in the Continental United States, Including Possible Revisions to the Formula Prescribed under Section 222 of the Communications Act.	)	Docket No. 19660 RM-690

COMMENTS OF TRT TELECOMMUNICATIONS CORPORATION

On July 27, 1977, the United States Court of Appeals for the Second Circuit vacated the Commission's January 1976 Report, Order and Notice of Proposed Rule-Making in this proceeding and remanded this matter to the Commission for further proceedings in accordance with the Court's opinion. However, on October 5, 1977, in granting the petitions for re-hearing filed by the Commission, as well as TRT Telecommunications Corporation (TRT) and ITT World Communications Inc. (ITT), the Court stayed issuance of its mandate, specifically holding that the "interim formula" prescribed by the Commission in the January 7 Order could remain in effect pending the Commission's further proceedings on remand from the Second Circuit's decision.

On October 7, 1977, the Common Carrier Bureau advised all interested parties, by letter, of the Second Circuit's action and invited comments by November 5, 1977, addressing the issues decided by the Second Circuit. TRT herein submits its comments in response to the Bureau's October 7 letter. */

*/ Since November 5 falls on a Saturday, TRT is filing these comments on November 7, the next business day following November 5.

1957

I. The Public Interest Dimension of the Current Dispute

In its July 27 opinion, the Second Circuit held that the Commission had not adequately articulated its reasons for determining that the public interest would be served by the invalidation of the original 1943 international formula and the prescription of the "interim formula" required by the January 7 Order. In its October 5 opinion on reconsideration, the Second Circuit stated that

> "It may well be that 'public interest' is not a necessary factor to be considered [in this case] in view of the fact that there seems to be no contention that the best-known technological methods of transportation are not being used and that no detriment is being suffered by the public from operations under the old or new formulas."

Apparently for that reason, the Second Circuit in its October 5 opinion went on to state that the prescription of the original formula in 1943

> "did not relieve the FCC of its statutory duty to prescribe a 'just reasonable, equitable, and in the public interest' formula. Assuming 'public interest' is eliminated as not adversely affected, mathamatical subtraction still requires the FCC to cope with the remaining first three requirements."

So it was that the Court, in discussing the proceedings which the Commission would conduct on remand, referred to the fact that

> "with ten month's experience behind them, the parties should be able to submit to the FCC such proof as would bear upon the equities or inequities of the 'interim' plan."

Because of these statements in the Second Circuit's October 5

opinion, the Commission might be inclined to ignore the "public interest" dimensions of its invalidation of the 1943 formula and prescription of the 1976 formula in issuing its order on remand. To do so would be to disregard an important element supportive of the Commission's January 7 Order and to misconceive the nature of the "public interest" responsibilities cast upon this Commission by Section 222 of the Communications Act.

Notwithstanding the statements contained in the Second Circuit's October 5 opinion, it is clear that a regulatory agency charged with responsibility for regulating the practices of an industry plainly acts in the "public interest" when it strikes down anti-competitive and restrictive practices, such as the original international formula. The Second Circuit's failure to follow this principle, which may well have been related to the failure of the Commission adequately to articulate it in the January 7 Order and the September 26, 1976 Order on Reconsideration or to the parties' possibly inadequate articulation of it in their briefs to the Second Circuit, should not cause the Commission to abandon the public interest considerations which support its action in this case.

There can be, and indeed there has been, no dispute that the 1943 formula, whatever the intent which originally prompted it and whatever its original impact, came to operate as a severe restraint upon competition among the international record carriers. Indeed, as RCA conceded in its opening brief on the merits to the Second Circuit

> "[the formula] diminishes the incentives of the international carriers to expend effort and revenues in attempts to divert traffic from each other." (RCA Br. 13).

The anticompetitive impact of the 1943 formula upon TRT was particularly severe. For even though TRT had grown from a regional to a world-wide carrier in the 30 years following adoption of the original formula, it was denied any share of unrouted traffic to most of the points that it now serves solely because it did not serve them in 1943. By contrast, because RCA enjoyed a dominant position in the world market when the formula was established, it was automatically assured of the lion's share of unrouted traffic irrespective of any effort on its part to attract new customers or to improve its services.

A market allocation scheme, which systematically so retards new competition and entrenches the position of dominant forces in the market, is so patently anticompetitive that, were it not for the explicit provisions of Section 222 and the Commission's approval, the 1943 formula would constitute a per se violation of the Sherman Act. See e.g. United States v. Topco Associates, 405 U.S. 596 (1972); United States v. Sealy, Inc., 388 U.S.350 (1967); Timken Roller Bearing Co. v. United States, 341 U.S.593 (1951).

By contrast, the 1976 formula has no anticompetitive features whatever. Indeed, it represents an ingenious device whereby the results of competition in the segment of the market containing knowledgeable consumers can be extended to the remaining portion of the market where consumers have inadequate communication

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requirements to become informed as to the merits of particular carriers and where it would be uneconomical for the carriers to attempt to reach such consumers with their promotional materials. Thus, without all of the advertising expenditures and the like that would be needed to inform every consumer in the market as to relevant information bearing upon the choice of a carrier, the entire market can be made to reflect the preferences of those consumers who do care to chose among carriers.

The substitution of the 1976 formula for the patently cartel-like and anticompetitive 1943 formula, standing alone, serves the public interest in a manner sufficient to fulfill this Commission's responsibilities under Section 222(e) of the Communications Act. FMC v. Aktiebolaget Svenska Amerika Linien, 390 U.S. 238 (1968).

In the Aktiebolaget case, the Federal Maritime Commission struck down two anticompetitive practices of steamship conferences regulated by it under a statute that is similar to Section 222. Specifically, Section 15 of the Shipping Act of 1916, 39 Stat. 728, empowered the FMC to disapprove cooperative agreements entered into by common carriers regulated by it, whether or not such agreements had previously been approved by the FMC, if it found them to be

> "unjustly discriminatory or unfair as between carriers . . .or to operate to the detriment of the commerce of the United States, or to be contrary to the public interest, or to be in violation of this chapter . . .." (390 U.S. at 240)

In exercising its jurisdiction under this statute, the FMC explicitly relied on antitrust policy and held that restraints such as the two conference rules before it would be approved only if the conferences could bring forth facts to demonstrate that the rules were required by a serious transportation need, were necessary to secure important public benefits or otherwise were in furtherence of a valid regulatory purpose of the Shipping Act. 390 U.S. at 243. The Court of Appeals reviewing the FMC's action disagreed, holding that the FMC could not disapprove a practice solely on the ground that it ran counter to antitrust principles.

The Supreme Court unanimously reversed, adopting a rationale which is directly applicable here:

> "By its very nature an illegal restraint of trade is in some ways 'contrary to the public interest,' and the Commission's antitrust standard, involving an assessment of the necessity for this restraint in terms of legitimate commercial objectives, simply gives understandable content to the broad statutory concept of 'the public interest.' . . . As long as the Commission indicates which of the statutory standards is the ultimate authority for its disapproval, we can see no objection to the Commission's casting its primary analysis in terms of the requirements of its antitrust test." (390 U.S. at 244).

The Supreme Court went on to characterize the arguments of those who opposed the FMC action as "not even superficially persuasive," when they contended that the whole purpose of the regulatory structure of the Shipping Act would be defeated if reliance on antitrust policy alone were sufficient grounds for invalidating

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anticompetitive practices. 390 U.S. 244-45. Said the Court:

> "The Commission must of course adduce substantial evidence to support a finding under one of the four standards of §15, but once an antitrust violation is established, this alone will normally constitute substantial evidence that the agreement is 'contrary to the public interest' unless other evidence in the record fairly detracts from the weight of this factor . . ..We therefore hold that the antitrust test formulated by the Commission is an appropriate refinement of the statutory 'public interest' standard." (390 U.S. at 245-46).

The principle of FMC v. Aktiebolaget Svenska Amerika Linien, which has often been followed by the Commission and the courts reviewing Commission orders in cases involving the removal of restrictive practices of common carriers,*/ is directly applicable here and fully supports the Commission's invalidation of the 1943 formula and the prescription of the 1976 formula. For the removal of a cartel-like anticompetitive device and the substitution for it of a device which allows the free functioning of a competitive market, in and of itself, serves the public interest, unless the parties supporting retention of the anticompetitive scheme can bring forward specific justifications which outweigh the implementation of antitrust policy. RCA and WUI, the only two carriers supporting the 1943 formula have not, and cannot, provide any factual public interest reasons for continuation of

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*/ See e.g. National Ass'n of Reg. Utility Comm'rs v. FCC, 520 F.2d 630, 636,639 (D.C.Cir. 1976); General Telephone Co. of the Southwest v. United States, 449 F.2d 846, 858 (5th Cir.1971).

(1963

the 1943 formula.

Cases like FCC v. RCA Communications, 346 U.S. 86 (1953), and Hawaiian Tel.Co. v. FCC, 498 F.2d 771 (D.C.Cir. 1974), which deal with the Commission's exercise of its jurisdiction under Section 214 of the Act, are not contrary to this analysis of the Commission's jurisdiction under Section 222 to pass upon the public interest aspects of the international formula.

Section 214 of the Communications Act, like comparable sections of the Interstate Commerce Act (49 U.S.C. §1 (18-22)), as well as analogous provisions of other regulatory statutes, embodies the premise that unlimited entry by carriers into a particular market may not necessarily serve the public interest or the public convenience and necessity. Accordingly, the Commission is vested with the responsibility under Section 214 to assure the feasibility of additional competition in a particular market prior to authorizing a competitor to enter that market.

Relying, as the Commission did in the RCA Communications and Hawaiian Tel. cases, upon nothing more than a bare, unexamined preference for competition as a justification for allowing new market entry is to fundamentally disregard the purposes of Section 214 and to default on the responsibility to assess the actual parameters of a market before authorizing a new entrant.

The Commission's determinations under Section 222, which require the Commission to assess the competitive consequences of a practice engaged in by carriers who have already been authorized to enter a market, raises issues far different than those presented

under Section 214. The terms, structure and legislative history of Section 222 demonstrate quite clearly that it was designed principally to ensure that the monopoly power which Western Union was gaining by virtue of its merger with Postal Telegraph in 1943 could not be misused by Western Union in its transfer of unrouted traffic to the international record carriers. There is nothing in this basic purpose, nor is there anything in the language of Section 222, which supports the idea that it was designed to repress fair competition among international carriers. Thus, just like the FMC under the Shipping Act, this Commission acting pursuant to Section 222 can rely solely on antitrust policy.

But even assuming arguendo that the standards of Section 214 cases apply to the Commission's reliance upon antitrust principles in this Section 222 proceeding, the Commission would by no means be barred from discussing the manner in which additional competition for international messages, such as would be encouraged by the substitution of the 1976 formula for the 1943 formula, would serve the public interest. For the RCA Communications case, as well as other applicable authority, makes it clear that it is proper for the Commission to rely on the general benefits of competition even when exercising its Section 214 jurisdiction:

> "[The Commission] is not required to grant authorizations only if there is a demonstration of facts indicating immediate benefit to the public. To restrict the Commission's action to cases in which tangible evidence appropriate for judicial determination is available would disregard a major reason for the creation of administrative agencies, better equipped as they are for weighing intangibles by specialization, by insight gained through experience, and by more flexible procedure. In the nature

C1065

> of things, the possible benefits of competition do not lend themselves to detailed forecast, but the Commission must at least warrant, as it were, that competition would serve some beneficial purpose such as maintaining good service and improving it." 346 U.S. at 96-97. (Citations omitted).

Thus, in issuing its order on remand, the Commission should clearly reiterate and expand upon its previously-stated reasons for believing that the removal of the anticompetitive 1943 formula may benefit the public.

In that regard, the actions of RCA, following what it thought was the Second Circuit's invalidation of the 1976 formula, are highly probative here. For on August 19, only three weeks following the issuance of the Second Circuit's July 27 opinion and well before the Second Circuit's issuance of its opinion on rehearing, RCA filed with the Commission a request for a substantial upward revision in international message rates. See Letter of Transmittal No. 4260 dated August 19, 1977, as well as the Section 61.38 analysis underlying RCA's tariff changes, both of which are attached to the original copy of these Comments so as to be included in the record of this proceeding. Although RCA doubtless now will disclaim any nexus between the timing of its tariff filing and the Second Circuit's July 27 action, the fact that RCA made this application so soon after its apparently successful efforts to force reinstatement of the 1943 formula raises substantial questions as to whether RCA's efforts to increase international message rates are closely related to its preservation of the anticompetitive atmosphere fostered by the 1943 formula. Thus, RCA's own actions

help demonstrate the potentially adverse impact of the 1943 anti-competitive formula on the maintenance of lower rates.

II. The Equitable Factors

While TRT believes that public interest considerations, standing alone, adequately support invalidation of the 1943 formula and the prescription of the 1976 formula, it also submits that by any standards the latter formula, which gives every international record carrier the opportunity to gain a proportionate share of unrouted traffic based upon current market realities, is more equitable than the 1943 formula, which has operated to disproportionately favor RCA (and to a lesser extent WUI) because in 1943 they enjoyed a larger market share than they do now.

The fact is, RCA has never advanced anything beyond an historic argument -- e.g. reliance on pre-1943 experience -- to justify operation of the 1943 formula. Thus, in the original comments which RCA filed in this proceeding (dated February 19, 1965, RM-690) RCA sought to support retention of the old formula on the basis of the Commission's observation in 1943 that

> "the Western Union cable system and the IT&T companies have had a more advantageous position than RCAC with respect to outbound traffic because of exclusive arrangements with the domestic land-line systems."

RCA went on to claim in 1965 that

> "ITT continues to receive residual benefits from its former 'extensive landline system.'" (Comments p.9).

And, eight years later when RCA filed its next comments in this proceeding, it was content to rely on its 1965 comments as "still

completely answer[ing]" ITT's arguments for revision of the 1943 formula (see RCA letter, dated June 26, 1973). Thus, when seeking to defend the equity and reasonableness of the old formula, RCA relied upon such archaic facts as ITT's operation of a landline system in the 1920's, 1930's and early 1940's -- a facet of the international record carrier business, which whatever its impact when the 1943 formula was prescribed, obviously has no impact today on the nature of competition in the industry and, in any event, could never justify the inequitable treatment suffered by TRT.

RCA's reliance upon historic circumstances to demonstrate the equity of continuing the 1943 formula fundamentally misconceives the basic nature of equity itself. As the Supreme Court has long recognized,

> "a continuing decree of injunction directed to events to come is subject always to adaption as events may shape the need. . . . The result is all one whether the decree has been entered after litigation or by consent. . . . In either event, a court does not abdicate its power to revoke or modify its mandate if satisfied that what it has been doing has been turned through changing circumstances into an instrument of wrong."

United States v. Swift & Co., 286 U.S. 106, 114-15 (1932). See also, Milk Wagon Drivers Union v. Meadowmoor Dairies, Inc., 312 U.S. 287, 298-99 (1941); United States v. United Shoe Machinery Corp., 391 U.S. 244,248 (1968). Under these principles, a

> "court not only has equitable discretion to respond to changing circumstances, but has a responsibility to take corrective action when its prior orders threaten to foster rather than forestall irreparable harm."

Consolidated Edison Co. of New York v. FPC, 511 F.2d 372, 378 (D.C. Cir. 1974).

These principles articulated in connection with the exercise of equitable discretion by trial courts are applicable a fortiori to an administrative agency's whose obligation is to tailor its orders to current realities, rather than justify them on the basis of historic circumstances. As the Supreme Court has held:

> "Flexibility and adaptability to changing needs and patterns of transportation is an essential part of the office of a regulatory agency. Regulatory agencies do not establish rules of conduct to last forever; they are supposed, within the limits of the law and of fair and prudent administration, to adapt their rules and practices to the Nation's needs in a volatile, changing economy. They are neither required nor supposed to regulate the present and the future within the inflexible limits of yesterday."

American Trucking Ass'n v. Atchison T. & S.F.R.Co.,387 U.S. 397, 416 (1967). In the light of these principles, RCA's reliance upon out-moded historic facts to support its contention that the 1943 formula still represents an equitable sharing of traffic among the IRCs must be disregarded.

What is pertinent are the contemporary facts concerning the operation of the formula. As the Commission indicated in its January 7, 1976 opinion, although TRT had by the time of the Western Union December 1974-March 1975, 13-week study achieved a 5.55% market share of all routed message traffic between the United States and the rest of the world, it was receiving only 1.4% of the unrouted traffic allocated by the formula.*/ This nearly 4-to-1 disparity between TRT's earned market share and TRT's formula traffic would be increased to about 15-to-1 disparity were the 1943 formula reinstituted.

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*/ Moman Aff. ¶ 2.

As shown in the attached affidavit of Mr. Robert Moman (¶ 3), during the first six months of 1977, TRT transmitted a total of 165,967 messages, which were either directly filed with it or which were specifically routed by customers via the Western Union system. This constituted 7.7% of the 2,149,095 messages which were directly filed with all IRCs or which were routed by customers to IRCs over the Western Union system. Thus, in the first six months of 1977, TRT's earned market share had increased to 7.7%.

While TRT was receiving 1.4% of all unrouted traffic allocated by the formula during the Western Union 13-week study, shortly after that study was completed, TRT was deprived of all formula traffic to Columbia and was remitted solely to receiving traffic from the Bahamas and Belize. (Moman Aff. ¶ 3). Were TRT restricted to receiving formula traffic from only those two countries, during the first six months of 1977, it would have obtained a total of 6,653 unrouted messages, only .5% of the 1,486,726 unrouted messages filed with Western Union during that period. (Id.). Thus, while TRT has now earned a market share of 7.7%, were it operating under the 1943 formula, it would receive only .5% of all traffic allocated under the formula, an "inequitable" result under anyone's definition of that term.

III. Other Developments Bearing Upon the Public Interest and Equitable Factors.

Among the reasons recited by the Court of Appeals in remanding this case to the Commission was the development of a record of the experience of the IRCs following the implementation of the 1976 formula. We have already demonstrated above the gross inequities

1070

that would be visited on TRT were a return to the 1943 formula mandated. However, because the court seemed particularly concerned with the possibility that implementation of the 1976 formula had set the IRCs on an inevitable path to an all-routed system or would result in unnecessary expenditures, we show here that post-November 1976 (the period following implementation of the 1976 formula) experience shows clearly that the adverse consequences feared by the Court have not occurred.

In expressing its concerns, the court was, at least in part, reflecting the arguments made to it by RCA concerning the purported evils of an all-routed system, particularly the expenses that would arise out of solicitation of customers by the IRCs. It is, therefore, of much more than passing interest here that on the same date that it sought a substantial increase in message rates, RCA filed a petition with the Commission which asked it to "revisit" the "free direct access" decision and which, at the same time, sought Commission action on the long-pending applications of RCA and other IRCs to initiate gateway operations in a number of cities heretofore included in the hinterland. (A copy of RCA's petition is attached to the original copy of these Comments and made a part of the record of this proceeding.)

While TRT does not at this point take a position on either RCA's free direct access proposal or its suggestion that the gateway applications be given renewed attention, it does point out that RCA's posture with respect to both these matters, which inevitably contemplate greater direct contact between the IRCs and international

telegram senders who presently are served only by Western Union, necessarily carries with it a strong potential for additional promotional activity by the IRCs directed at senders of international telegrams. That RCA advanced these proposals only three weeks after the Second Circuit essentially adopted its position with respect to the international formula shows, at the very least, that retention of the anticompetitive 1943 formula would not necessarily lessen the potential for promotional expenditures on the part of the IRCs.

Just as RCA's August 19 petition reflects that increased promotional expenditures seem to have been contemplated by RCA, notwithstanding the then-apparent resurrection of the 1943 formula, TRT's experience since November 1976 demonstrates that the substitution of the interim formula for the 1943 formula has not caused the carriers to embark upon the binge of promotional expenditure apparently feared by the Court of Appeals. RCA argued in support of its unsuccessful efforts to obtain immediate issuance of the Second Circuit's mandate that the invalidation of the 1943 formula "will result in almost certain increases in costs to the carriers and, ultimately to the users of the IRCs' services," (RCA Motio p. 5). TRT, therefore, presented to the Second Circuit an affidavit of TRT's Vice President for Marketing (copy attached hereto), which made it clear that since the implementation of the 1976 formula, just as under the 1943 formula, TRT has aimed its promotional efforts at high-volume users who subscribe to telex services of either the IRCs or Western Union and has not undertaken anything more than de minimis

1972

efforts to obtain routed traffic from those who customarily do not route messages. Thus, the change in the international formula has not altered TRT's "sales and marketing approach with respect to international cable traffic." (Gross Aff. ¶2).

In further refutation of the argument that the interim formula would lead to a marked increase in efforts to obtain more routed traffic and thus would lead to an increase in promotional spending, is total industry experience with respect to the relative amounts of routed traffic, before and after adoption of the interim formula. Underlying the Commission's January 7 order was Western Union's 13-week analysis of the composition of all traffic handled under the 1943 formula. During that 13-week period (December 1, 1974-March 1, 1975), Western Union transferred a total of 911,356 messages to the IRCs, of which 700,299, or 77%, were unrouted telegrams distributed under the 1943 formula. (Moman Aff. ¶ 4). By way of comparison, during the first quarter of 1977, the first full quarter of experience under the interim formula, Western Union transferred a total of 847,557 messages to the IRCs, of which 704,451, or 83%, were unrouted.*/ (Moman Aff. ¶ 5).

Thus, following the adoption of the 1976 formula, there were relatively fewer messages sent via specific routings than there were under the 1943 formula. This fact demonstrates almost conclusively that the adoption of the 1976 formula has not caused the IRCs to

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*/ Comparable figures for the second quarter of 1977 are 932,475 total transfers, of which 782,275, or 84%, were unrouted. (Id.)

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expand their promotional efforts to capture the business of customers who previously did not route traffic; it has not caused them to move toward an all-routed system. Instead, this evidence strongly indicates that the international record carriers' promotional activities for telegraph traffic have been devoted to increasing their market share among that segment of the market that is sufficiently sophisticated to make informed choices as to carriers.

TRT's post-November 1976 experience also refutes the allegations of RCA that implementation of the interim formula would increase the IRCs' operational costs. As is made clear in the attached Moman affidavit (¶ 6), except in one instance, TRT has been able to transmit all of its post-November 1976 message traffic on circuits which either were already in use before implementation of the 1976 formula or, if put up after that date, were necessitated by the commencement of direct circuit operations to a new foreign point. TRT was obliged to operate an additional circuit with Cuba for the transmission of additional unrouted traffic to that point. However, TRT's circuitry with Cuba is via HF radio,

(1674

and TRT was obliged to do no more than activate a new frequency in an already existing transmitter at no additional cost to TRT.

By the same token, TRT has not been obliged to employ additional message operators as a result of the new formula. Indeed, as of November 1, 1976, TRT had 27 message operators on its payroll. As of November 1, 1977, after a full year of the 1976 formula's operation, TRT employed only 21 such operators. This reduction in personnel has come about as a result of the automation of certain operator functions. The capital costs involved in this automation have been less than $5,000 and would have been undertaken irrespective of any change in the formula. (Moman Aff. ¶ 7).

Finally, the additional message volumes which TRT has handled as a result of implementation of the 1976 formula have not required any expansion in TRT's message switch. The capacity of TRT's automated message switch, as it existed prior to the adoption of the 1976 formula, has been adequate to handle the additional volumes that have been generated by TRT's participation in its fair share of formula traffic. (Moman Aff. ¶ 8).

In short, TRT's experience demonstrates quite clearly that it has not suffered any increases in either promotion or operating expenses as a result of the adoption of the 1976 formula. Thus, RCA's arguments that the 1976 formula would necessarily lead to increased costs and the Second Circuit's corresponding concerns with respect to that argument are groundless. The Commission

01075

should thus find that there is no reason whatever to believe that the implementation of that formula has increased either promotion or operational expenses as among the carriers.

CONCLUSION

For all the reasons stated above, the Commission should enter an order on remand in these proceedings finding that the adoption of the 1976 formula serves the public interest and, unlike the 1943 formula, provides for equitable treatment as between the IRCs. This finding is justified, indeed it is required, by the evidence in this proceeding, wholly without regard to whether an all-routed system of the kind discussed in the January 7 order is ever implemented. Thus, the Commission should find that the "interim" or "1976" formula is "just, reasonable, equitable, and in the public interest" when considered on its own merits.

Respectfully submitted,

E. Edward Bruce
Covington & Burling
888 Sixteenth Street, N.W.
Washington, D.C.20006

Attorney for
TRT Telecommunications Corporation

Dated: November 7, 1977

AFFIDAVIT

1. My name is J. Robert Moman. I currently serve as Director of Operations and Management Information Systems of TRT Telecommunications Corporation, a position I assumed in August, 1976. Prior to that time, I served as Special Assistant to the President of TRT. In both capacities, I have been responsible within TRT for the development of operational and financial data bearing upon the operation of the international formula used to distribute among the international record carriers (IRCs) unrouted international telegraph traffic picked up by The Western Union Telegraph Company. In that capacity, I have prepared or supervised the preparation of the various submissions which TRT has made to the Federal Communications Commission in connection with its evaluation of the original 1943 international formula and its prescription in 1976 of a revised formula.

2. To provide information to the Commission as to the operation of the 1943 formula, Western Union analyzed all of the traffic transferred by it to the IRCs for the 13-week period between December 1, 1974 and March 1, 1975. The Western Union study revealed that TRT then received unrouted traffic under the 1943 formula to only three overseas points -- Columbia, the Bahamas and Belize (formerly British Honduras). As was previously recited in the January 7, 1976, order entered by the Commission in the international formula proceeding, limiting TRT to receipt

of "formula traffic" for only Columbia, the Bahamas, and Belize resulted in TRT's receipt of 1.4% of all the unrouted traffic distributed during the Western Union 13-week study. (Order ¶ 17). At the same time, TRT had achieved a 5.55% market share with respect to all traffic specifically routed by customers, either pursuant to designation of a specific "via" carrier for messages filed with Western Union or pursuant to the direct filing of messages with IRCs. (Order ¶ 18). Thus, during the Western Union 13-week study there was a 4 to 1 disparity between the market share which TRT had earned in competing for specifically routed traffic and the share of unrouted traffic which TRT obtained under the 1943 formula.

3. Were the Commission to reinstitute the 1943 formula, that large disparity would increase 4-fold. In July, 1975, TRT was informed that it would no longer receive any formula traffic for Columbia and would thereafter receive such traffic only for the Bahamas and Belize. During the first six months of 1977, the restriction of TRT to Bahamas/Belize traffic would have resulted in it obtaining a total of 6,653 unrouted messages, which is only .5% of the 1,486,726 unrouted messages filed with Western Union during that period. At the same time, TRT transmitted 7.7% of the messages which were directly filed with all IRCs or which were routed by customers to particular IRCs over the Western Union system -- 165,967 messages out of a total of

2,149,095. Thus, while TRT has now earned a market share of 7.7% of all routed traffic, it would, were it operating under the 1943 formula, receive about 1/15th as much of the unrouted traffic distributed according to the formula.

4. The 13-week Western Union study reveals the percentages of routed and unrouted Western Union-originated traffic that was transferred to the IRCs. During the study period, Western Union transferred a total of 911,356 messages to the IRCs, of which 700,299, or 77%, were unrouted messages to be distributed under the formula. To my knowledge, the Western Union 13-week study is the only source of industry-wide data available with respect to the routed/unrouted percentage of Western Union-originated telegraph traffic prior to the implementation of the 1976 formula.

5. Under the 1976 formula, however, it is possible to calculate for each quarter the percentage of routed/unrouted Western Union-originated traffic, because the provisions of the 1976 formula require a continual calculation of the routed market share earned by each IRC. During the first quarter of 1977, which was the first calendar quarter of experience under the 1976 formula, Western Union transferred a total of 847,557 messages to the IRCs, of which 704,451, or 83%, were unrouted. During the second quarter of 1977, Western Union transferred a

total of 932,475 messages to the IRCs, of which 782,275, or 84% were unrouted. Thus, comparison of experience under the 1976 formula and under the 1943 formula reveals that the adoption of the 1976 formula has not led Western Union's customers to increase their specific routings of international telegraph traffic. In fact, unrouted traffic filed via Western Union has increased from 77% of total transfers to between 83% and 84%.

6. TRT has incurred no additional operational expenses as a result of the implementation of the 1976 formula. With one exception, TRT has not been required to install or operate any additional message circuits as a result of its receipt of additional volumes of message traffic pursuant to the 1976 formula. It has, instead, been able to transmit all of its message traffic on circuits which either were already in use before implementation of the 1976 formula or, if put up after that date, were necessitated solely by the commencement of direct operations to new foreign points and would have been required without regard to the volumes of telegraph traffic transmitted by TRT to those points. The only additional circuit which TRT has been required to operate as a result of its receipt of increased volumes of formula traffic has been an HF radio circuit between the United States and Cuba. However, TRT incurred neither any capital nor operational expenses in connection with the activation of that circuit, since it only necessitated the activation of an

additional frequency on a transmitter already used by TRT for the operation of other HF circuits to Cuba.

7. TRT has been able to handle all the additional traffic which it had received under the 1976 formula with fewer message operators than it had under the 1943 formula. As of November 1, 1976, TRT employed 27 message operators. As of November 1, 1977, after a full year of the 1976 formula's operation, TRT employed only 21 such operators. Were the Commission to reinstitute the 1943 formula, TRT would still be required to employ these 21 operators. The reduction in personnel reflected above has come about as a result of the automation of certain operator functions, which involved capital expenses of less than $5,000 and which would have been instituted without regard to the change in the international formula.

8. During the first full year of the 1976 formula's operation, TRT has been able to handle all of its international telegraph traffic by means of an automated message switch which was planned and purchased well before the implementation of the 1976 formula. Thus, the prescription of the 1976 formula has not required TRT to incur any additional capital expenses to increase its message switching capacity.

9. In the light of the facts set forth in paragraphs 6-8 above, it is clear that TRT's receipt of additional volumes

of traffic pursuant to the 1976 formula has not caused TRT to incur any additional capital or operational expenses. By the same token, the conclusions recited in the affidavit of Kenneth Gross, executed on August 22, 1977, with respect to TRT's promotional programs, continue to be valid.

10. Pursuant to 28 USC § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Executed on November 7, 1977.

J. Robert Moman

A F F I D A V I T

1. My name is Kenneth W. Gross, I am Vice President of Marketing for TRT Telecommunications Corporation. As such I am responsible for the direction of TRT's Field Sales Force, development of TRT's sales plans and programs, sales promotions and sales aides and marketing and advertising promotions. I have had responsibility for TRT's marketing, advertising and promotional programs since June of 1975 and have been responsible for the Field Sales Force since February 1976.

2. I am familiar with the decision of the Federal Communications Commission to revise the International Formula for distributing unrouted international cable traffic, which became effective in November 1976. This change in the formula has not altered TRT's sales and marketing approach with respect to international cable traffic.

3. There are several practical explanations for this aspect of TRT's promotional program:

a. Between 99.8% and 99.9% of TRT's promotional budget is directed toward customers with significant communications requirements to overseas points. These customers, virtually without exception, are engaged in international commerce and all have telex machines obtained from either one or more of the international carriers, including TRT, or from the Western Union Telegraph Company domestic system.

b. The marketing and sales program and budget of TRT

is geared to attracting international telex and cable traffic from these commercial customers. Since the estimated volume of occasional international cablegram usage is so small, the economic of effective marketing generally argue against soliciting traffic f them.

c. TRT's market share of international cable traffic has substantially increased during the past two years wholly indepe of any specific advertising or promotional investment in developing traffic. Rather, TRT's international cable revenues have increase as a side effect of TRT's sales and promotional efforts in develop- ing international telex traffic from telex subscribers.

d. Telex subscribers, who by and large file cablegrams via their telex machines, are, unlike occasional cablegram users, often accutely aware of the difference in the cost and services offered by the US IRCs, so that rate reductions and service enhancements are the most effective way of competing for the traffic of such customers.

e. From a practical marketing and sales approach, the November, 1976 implementation of the revised International Formula has not resulted in any reallocation of TRT's sales pro- motion budget in connection with attracting additional volumes of cable traffic.

f. TRT believes that by promoting its telex traffic and by offering improvements in its cablegram service or initiating rate reductions (should revenue and cost allow them) it will be able to obtain additional cable traffic. Of course, if TRT were obliged to return to the 1943 formula, which in effect penalizes carriers for increasing their routed traffic, its incentives to

improve its share of routed traffic would not be as great as th
are under the 1976 formula.

4. Pursuant to 28 U.S.C. §1746, I declare under penalty of purjury that the foregoing is true and correct.

Executed on August 22, 1977.

Kenneth W. Gross

CERTIFICATE OF SERVICE

I, Dorothy A. Addair, hereby certify that a copy of the foregoing has been sent this 7th day of November, 1977, to the following by United States mail, postage prepaid:

Joseph J. Jacobs, Esq.
ITT World Communications Inc.
67 Broad Street
New York, New York 10004

Carl J. Cangelosi, Esq.
RCA Global Communications, Inc.
60 Broad Street
New York, New York 10004

Roger Newell, Esq.
Western Union International, Inc.
One WUI Plaza
New York, New York 10004

Leon Kestenbaum, Esq.
The Western Union Telegraph Co.
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Washington, D.C.20036

Mr. J.A. Berenger,Manager
The French Telegraph Cable Co.
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New York, New York 10004

United States-Liberia Radio Corp.
1200 Firestone Parkway
Akron, Ohio

Mr. D.N. MacLeod
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Washington, D.C.20024

Walter R. Hinchman
Chief, Common Carrier Bureau
Federal Communications Commission
1919 M.Street, N.W.
Washington, D.C.20554

Dorothy A. Addair

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter Of	)	
	)	
Hinterland Handling by The Western Union Telegraph Company of International Message Telegram) Traffic.	)	Docket No. _____

To: The Commission

PETITION

RCA Global Communications, Inc. (RCA Globcom), pursuant to the provisions of Sections 4(i), 4(j), 201-205, 208, 214, 222 and 403 of the Communications Act of 1934, as amended, hereby petitions the Commission for the relief set forth herein and in related filings referenced herein and submitted under separate cover on this same date.

Specifically, RCA Globcom is requesting:

- That the Commission "revisit" the so-called "free direct access" decision and associated policies, modify these, and permit hinterland senders and recipients of international message telegrams to access (or be accessed by) RCA Globcom at no additional cost to such senders or recipients in excess of the prevailing tariff rate for international telegram service.

- That the Commission alter its policies to allow other domestic carriers in addition to Western Union to participate with international record carriers in the hinterland pick-up and delivery of international message telegrams.

- That, pursuant to Section 222(e)(3) of the Communications Act, the Commission institute an appropriate proceeding to determine expeditiously whether the current revenue divisions between RCA Globcom and Western Union for the handling of international message telegrams should be reduced as of the date of this Petition, and to require, pendente lite, Western Union to maintain appropriate records so as to be able to make an adjustment with RCA Globcom reflecting the difference in the amount it retains and any lower rate prescribed.

- That, in the event the Commission does not act favorably and in a timely manner on our request for modification of the free direct access policy or a reduction in the toll traffic settlements paid to Western Union, the proposed tariff filing providing for an increase in RCA Globcom international telegram rates for messages originating in the continental U.S., which is being filed simultaneously, be permitted to become effective on the scheduled implementation date.

RCA Globcom is an international communications common carrier authorized under Title II and III of the Communications Act to furnish international record services between the United States and numerous foreign and overseas points. Included among RCA Globcom's authorized service offerings is message telegram service. RCA Globcom presently is tariffed to provide international telegram service between the United States and a majority of overseas points.

The Western Union Telegraph Company (Western Union) is a domestic communications common carrier presently furnishing domestic record services. As the sole common carrier authorized to handle telegram traffic within the continental United States, it is the single carrier upon whom RCA Globcom has had to rely for the domestic pick-up and delivery of international message telegram traffic beyond the international "gateway" cities of New York, San Francisco, Washington, Miami and New Orleans.

The international record carriers are permitted to furnish international telegram service within gateway cities*, now numbering five, and as a consequence interconnect with Western Union to accommodate so-called hinterland traffic originating or terminating beyond the gateways.

There are only two limited exceptions to the strict operational bifurcation between the gateways and the hinterland. A hinterland customer may bypass Western Union if the customer is willing to pay the additional cost of accessing a gateway office of an international carrier. Secondly, a customer within a gateway city may file an overseas telegram with Western Union for delivery to an international carrier.

The Commission, as a matter of policy, has thus far declined to institute procedures allowing hinterland customers to file their overseas telegrams directly by means of toll-free telephone calls,** or to grant to the international record carriers long-requested authority to open gateways additional to the current five cities.***

The relationship between Western Union and the international carriers involves a mechanism to accommodate a division of international message telegram revenues between them. Specifically, Western Union is entitled to receive a portion of the charges for international message traffic

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* Section 222(a)(5).

** See International Record Carriers' Communications, 40 FCC2d 1082 (1973).

*** See International Record Carriers' Communications, 54 FCC2d 532; 54 FCC2d 909 (1975); 58 FCC2d 250 (1976).

C1089

sent or received by way of its facilities. The proper divisions of revenue are determined by negotiation between Western Union and the international carriers and, ultimately, by Commission prescription, if no agreement can be reached as to an appropriate division.

Current Status of RCA Globcom Message Telegram Service

Western Union's position as sole provider of domestic telegram service gives it a unique capability to control or otherwise influence the charges for international message telegram service. Accordingly, in 1975 Western Union was able to exact major increases in domestic landline haul charges from the international carriers.* Significantly, there was no pass through to the public of any portion of the higher landline divisions.** Thus, the higher costs of furnishing international telegram service were "absorbed" by the international carriers, including RCA Globcom. Such absorption has resulted in increased payments by RCA Globcom to Western Union of $2.8 million in 1975; $2.4 million in 1976, and estimated additional payments of $2.3 million in 1977.

Pursuant to the requirements established by the Commission in Docket No. 20778, *** RCA Globcom has undertaken revenue and cost studies, the latter on a fully distributed basis, to ascertain the earnings status of the various services RCA Globcom provides. Although the studies will not be

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* International Record Carriers' Communications, 55 FCC2d 96. These essentially amounted to three cents per word for ordinary rate telegrams and 1.5 cents per word for letter telegrams.

** Indeed, there has in fact been no increase to the public for international telegram service since 1966 and, in some cases, since 1958.

*** In Re Preliminary Audit and Study of International Carriers, 59 FCC2d 240 (1976).

submitted until November 15 of this year, our efforts to date indicate that in 1976 RCA Globcom suffered losses of approximately $4 million in the provision of international message telegram service. Were we to continue to offer this service under current rates and toll divisions with Western Union, earnings projections for the years ahead demonstrate that we would incur continued, substantial losses.

In the interest of all its ratepayers, RCA Globcom is compelled at this time to seek appropriate relief. One alternative, of course, is to increase charges to the public,* a measure constituting one of the alternative forms of suggested relief. However, other solutions are available which would not result in increased charges to the using public at this time and, significantly, likely would result in improved service to the public.

There are available viable alternatives to continued exclusive reliance upon Western Union in the provision of international message telegram service to and from points in the hinterland. Thus, the Commission can allow the implementation of free direct access to permit hinterland customers access to RCA Globcom at no additional cost to the customers. Similarly, it can authorize other domestic record carriers, in addition to Western Union, to handle international message traffic in the hinterland. It is our contention that these alternatives to Western Union, if made available, would result in substantial efficiencies and economies in the handling of such telegram traffic.

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* In this case, on-pass to the public Western Union's increased landline haul charges implemented in March, 1975.

Although we do not accept its contention, we note Western Union's recent assertion that, notwithstanding various telegram rate increases granted to it by the Commission (as well as increased toll divisions obtained at the expense of international record carriers), "...telegram... service has [not] earned a fair rate of return for a number of years now, and the earnings for telegram service are particularly deficient."*

Western Union's alleged loss situation, if true, would appear to be self-perpetuating and without end. Since the demand for international telegram service is now gradually declining (albeit at a relatively moderate rate, nowhere approaching the drastic decline experienced in the domestic telegram market), Western Union's earnings position cannot improve through increased volume, even assuming that any additional volume would be incrementally profitable. Thus its only alternative would be to seek still higher portions in international toll divisions, a measure neither RCA Globcom nor the public can afford.

In any event, to the extent Western Union is incurring revenue shortfalls in its provision of domestic telegram service, such shortfalls should not be made the direct burden of international carriers and thus the indirect burden of users of international telegram service. Clearly, Western Union plant was justified and constructed primarily to handle domestic telegram traffic at a time when such traffic dwarfed in volume international

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* Western Union "Responsive Comments", In Re Interface of International Telex With Domestic Telex and TWX Services (Docket No. 21005), August 8, 1977, at 25.

telegram traffic. As this no longer is the case, Western Union's revenue requirement for message telegram service is being borne disproportionately and unfairly by international carriers and their users because plant constructed to accommodate domestic traffic and the expense associated therewith are being allocated and charged against international traffic. Under the circumstances, the public interest requires that international record carriers be afforded the capability to utilize alternatives to Western Union.

Free Direct Access

In rejecting a recent attempt by Graphnet to amend its tariff to provide for the domestic delivery of international public messages,* the Commission stated:

> "...[I]t appears that the proposed service is contrary to our Free Direct Access decision [40 FCC2d 1082]. In that decision, we held that the IRCs could not absorb the land-haul charges for hinterland delivery. We clearly stated that where hinterland delivery was performed by any party other than Western Union, the customer would have to pay the charges for service from the gateway to the hinterland location and that the alternative delivery mode could not be the agent of the IRC."

And further:

> "Since no party has requested the Commission to revisit that decision by an appropriate filing and we do not have a sufficient record before us, we will not in this present proceeding revisit that decision." Para. 8.

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* In Re Graphnet Systems, Inc., (FCC 77-368, released June 6, 1977).

We hereby request that the Commission "revisit that decision" and that it do so promptly. Such decision and its continued effectiveness constitutes an unwarranted and unjustified policy which, in effect, serves to guarantee the continuation of Western Union practices which have led to disastrous consequences in the domestic telegram market.

In 1973, the Commission decided that provision by international carriers of free direct access* would constitute expansion of international carrier gateway cities requiring prior authorization under Section 222(a)(5) of the Communications Act before tariff provisions offering the service could be made effective.** However, the Commission specifically noted that its course of action was not intended to "indicate any position as to the merits" of the free direct access concept.*** We believe that the free direct access concept should be "revisited" and adopted at the earliest opportunity. This Petition, in part, seeks such a favorable result.**** Specifically, we seek the opportunity to utilize cost-effective and efficient means to provide international telegram service to our customers, and we believe that any continued restraints imposed upon our ability to do so are unjust and unreasonable.

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* It should be understood, of course, that there would be costs involved in furnishing such access. However, such costs would be incurred in lieu of those "costs" associated with landline-haul payouts to Western Union.

** International Record Carriers' Communications, 40 FCC2d 1082. Significantly, Western Union contentions opposing free direct access were found to be "without merit". 40 FCC2d 1083. See also, 38 FCC2d at 549.

*** 40 FCC2d 1087.

**** Accordingly, this Petition may properly be viewed as "an application under Section 222(a)(5) for authorization to file tariff revisions offering" free direct access.

Moreover, we believe that continuation of the free direct access policy unreasonably restricts the public in the use of a readily available operational alternative to transmit to or receive international message telegrams from the hinterland. Such restriction effectively forecloses the public user in the hinterland from the option of dealing directly with the international carrier of his choice by requiring that he involve himself with a third (and unnecessary) party to the transaction. We submit under the circumstances that this restriction unreasonably deprives the public of an available communications option which would be privately beneficial without being publicly detrimental.*

Domestic Carrier Alternatives To Western Union

There are other domestic carriers capable of performing the function served by Western Union with respect to international telegram handling. One such carrier unsuccessfully attempted to amend its tariff to permit the domestic delivery of international public messages. Its tariff was rejected on the ground that its existing authorization did not permit such an undertaking.** It is noteworthy, however, that the Commission, in requiring the domestic carrier to file an appropriate Section 214 application, asserted:

> "We are not saying here that such an offering could not be found to serve the public convenience and necessity, but only that a tariff filing is not the appropriate procedure for obtaining consideration of the question."***

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* C.f., Hush-A-Phone Corp. v. U.S., 238 F.2d 266 (1956); In Re Carterfone, 13 FCC2d 420, reconsideration denied, 14 FCC2d 571 (1968).

** In Re Graphnet Systems, Inc., supra.

*** Id., at Para. 6.

We construe this Commission language to represent a clear invitation to U.S. domestic carriers to seek appropriate authorization to perform land-line haul functions associated with international message telegram traffic. Implicitly, the Commission recognizes that Western Union's status with regard to the handling of international messages is not immutable and that public interest reasons may warrant a change.

Accordingly, we urge the Commission, sua sponte, to alter its policy to allow other domestic carriers along with Western Union to participate with international carriers in the provision of international telegram service. Minimum barriers, if any, should apply to any appropriate requests forthcoming from domestic carriers in this area and such requests should be treated on an expedited basis.*

The Additional Gateways Issue

In the above-mentioned 1973 action, the Commission indicated that "one of the matters" included in Docket No. 19660 was "a series of applications for the authorization of additional gateway cities."** This matter still is pending before the Commission notwithstanding the passing of over four years*** and repeated Commission assurances that it is considering the

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* In the absence of any pertinent restrictive conditions which attach to the existing facilities of domestic carriers, it appears that tariff filings or amendments, rather than additional authorization, may be all that is required for such carriers to participate in international message telegram service. See MCI v. FCC, No. 75-1635, D.C. Cir., July 28, 1977.

** 40 FCC2d 1087.

*** An interim Commission decision authorized TRT Corporation to operate in New York City, Washington, D.C., and San Francisco, while permitting others including RCA Globcom to commence operations only in Miami and New Orleans. See International Record Carriers Operations, 54 FCC2d 909 (1975); 58 FCC2d 250 (1976).

additional gateways question on an expedited basis.*

It should be noted that grant of the requested additional gateway authorizations could have alleviated to some degree the problem set forth herein.

Section 222(e)(3) Prescription

Concomitant with the above-referenced solutions, RCA Globcom hereby requests relief pursuant to Section 222(e)(3) of the Act.** Essentially, the Commission should establish expeditiously such proceedings as may be necessary to: (1) determine that the current divisions of charges between Western Union and RCA Globcom for international message telegram traffic should be reduced; and (2) thereafter prescribe "new " divisions for such charges, as follows:

Ordinary Telegram	$ .065
Letter Telegram	.0325
Press	.021
Government Ordinary	.065
Government Half Rate	.0325

The effect of such a prescription would be to reestablish those dividends which applied prior to the 1975 modification of divisions.

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* See, e.g., 40 FCC2d 1087 ("an expeditious resolution" -- 1973); In Re Graphnet et al., FCC 77-2, released January 11, 1977, at Para. 15 (an intention "to expedite our proceedings in that docket").

** Section 222(e)(3) provides:

> "Whenever, upon a complaint, or upon its own initiative, and after a full hearing, the Commission finds that any such distribution of telegraph traffic among telegraph carriers, or any such division of charges for such traffic, which is being made or which is proposed to be made, is or will be unjust, unreasonable, or inequitable, or not in the public interest, the Commission shall by order prescribe the distribution of such telegraph traffic, or the division of charges therefor, which will be just, reasonable, equitable, and in the public interest, and will be, so far as is consistent with the public interest, in accordance with the existing contractual rights of the carriers."

C1097

Conclusion

Adoption of the course of action set forth herein or any combination thereof sufficient to restore the status quo ante with respect to the three cent per full rate word revenue in the divisions with Western Union would ameliorate substantially RCA Globcom's loss position with respect to international message telegram service. RCA Globcom would then desist from its effort to obtain a rate increase for such service at this time and the tariff submission being made under separate cover would be withdrawn. Users would benefit to the extent they would not be obliged to pay higher rates for RCA Globcom international telegram service.

We recognize a general public need for the continuation of international message telegram service, particularly to meet the requirements of the occasional or small user. However, we seek an alternative to a continued Western Union course of action which provides it with a capability to damage international message telegram service in the same fashion it has domestic telegraph service -- by exacting charges therefor beyond the means of the very segment of the public which the service is intended to benefit.*

Neither the international carriers directly, nor the users of international telegram service indirectly, should be required to continue to subsidize Western Union's domestic telegram enterprise or to underwrite its

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* Between 1945 and 1974, Western Union increased its charge for full-rate telegrams on 19 separate occasions. The overall effect of these charges amounted to increases of 3,775 percent and, it has been shown, was accompanied by a substantial decline in the quality of telegram service. See "The Reluctant Messenger", A Consumer Study by Rep. Benjamin S. Rosenthal, U.S. Congress, September, 1974.

expanded endeavors in the competitive market for specialized communications services. Alternative methods and carriers for hinterland handling of international messages should be made available, as it is the public user who stands to benefit ultimately from such alternatives. Continued maintenance of the status quo would constitute a wholly unwarranted and unjustifiable interference with our right, indeed obligation, to innovate and to provide service to the public at reasonable prices, and the public's right to utilize the most economical available communications media in a manner privately beneficial without being publicly detrimental.

Wherefore, in view of the foregoing, RCA Globcom respectfully requests that the Commission promptly consider and grant the alternative relief, or combinations of same, requested herein.

Respectfully submitted,

RCA GLOBAL COMMUNICATIONS, INC.

By: /s/ F. J. DeRosa
F. J. DeRosa

By: /s/ D. J. Elardo
D. J. Elardo

By: /s/ W. F. Taylor
W. F. Taylor

Dated: August 19, 1977

Its Attorneys

60 Broad Street
New York, New York 10004
(212) 363-2301

C1033

CERTIFICATE OF SERVICE

I, Deborah Spinosa, hereby certify that a copy of the foregoing "Petition" was served by first-class mail, postage prepaid, on this 19th day of August, 1977, upon:

The Western Union Telegraph Company
1828 L. Street, N.W.
Suite 1001
Washington, D.C. 20036

Deborah Spinosa

RCA Global Communicatio... ...c | 60 Broad Street | New York, NY 10004 | T... Phone (212) 363-7825

C1100

RCA

Transmittal No. 4260

Mr. Vincent J. Mullins, Secretary
Federal Communications Commission
Washington, D.C. 20554

...er H Ende
...tive Vice President
...tegy Development

Dear Mr. Mullins: August 19, 1977

In accordance with the requirement of the Communications Act of 1934, as amended, we are filing herewith the following revised pages to our Tariff F.C.C. No. 60, to become effective January 1, 1978:

F.C.C. No. 60		F.C.C. No. 60		F.C.C. No. 60	
Page	Revision	Page	Revision	Page	Revision
1	352	89	16	110	17
66D	5	90	19	111	9
71	14	91	13	112	9
72	17	92	12	113	9
73	8	94	5	114	13
74	11	95	10	115	12
75	14	96	12	116	10
76	16	97	12	117	14
77	16	98	18	118	15
78	14	99	6	119	16
79	12	100	15	120	16
80	13	101	20	121	9
81	14	102	16	122	14
82	7	103	10	123	20
83	13	104	15	124	16
84	9	105	11	124A	4
85	10	106	9	125	7
86	13	107	10	126	13
87	7	108	13	127	15
88	10	109	15		

This filing is being made for the purpose of increasing the per word rate for public message telegraph traffic originating in the United States destined to all overseas countries (with the exception of traffic to Guam, Hawaii, Midway, Puerto Rico, St. Croix, St. Thomas and Samoa American). The per word rate is increased as follows:

Ordinary	$0.03
Letter Telegram	.01½
Ordinary Press.....	.01
Government	
Ordinary	$ .03
Half Rate	.01½

It will be recalled that on the 23 of July 1970 the Western Union Telegraph Company filed a formal complaint with respect to the division of tolls accruing to it for originating and terminating international telegraph messages. This matter was set for hearing by the Commission. Thereafter, and prior to the conclusion of the hearings, the international carriers and Western Union, at the instigation of the Commission, met to determine whether the matter could be resolved by agreement between them. After numerous meetings an agreement was finally reached which resulted in the current division of tolls. With certain modifications and exceptions this agreement was approved by the Commission.

The Commission did not, however, as a result of the change in division of tolls, authorize or in any way indicate approval for any increase in charges to the public which might allow the international carriers to recover part or all of the increased payouts to the Western Union Telegraph Company.

Some time has now elapsed since the revised division of tolls became effective. The effect of such revision is therefore now readily apparent. In addition, the international record carriers have been making separation studies designed to show the revenues and expenses applicable to the various services they provide pursuant to the requirements set forth by the Commission in Docket No. 20778. While such studies are not to be submitted formally to the Commission until later this year, we have made sufficient progress to have a reasonably adequate indication of the current earnings picture with respect to the provision of telegraph service.

As is set forth more fully in the attachments, it is clear that at the present time revenues accruing to RCA Global Communications after payouts to Western Union for the domestic haul and settlement with foreign correspondents are not sufficient to cover costs, much less to provide any return. The studies further indicate that on any basis, even if all questionable items of expense were to be resolved against RCA Globcom and all questionable items of revenue were to be resolved in favor of RCA Globcom, the company would not, after being fully compensated for the increased 3 cents per ordinary word payouts to Western Union, cover applicable expenses.

It is because of this dire situation that RCA Globcom must seek relief.

RCA Globcom is fully aware of the on-going preliminary rate audit (Docket No. 20778) and therefore has determined not to seek at this time rate relief sufficient to allow it a fair rate of return, or for that matter even increases of sufficient magnitude to reach the break-even point. However, it is of the view that some relief is urgently required promptly because it is clearly unsound as a matter of general ratemaking policy and philosophy to continue to provide a major service at a loss of this magnitude. This request for relief is, of course, without prejudice to any position that either the Commission Staff, other entities, or RCA Globcom itself may advocate with respect to Docket No. 20778 proceedings.

Furthermore, RCA Global Communications emphasizes that this request for rate relief and the tariff filing is being submitted as a secondary alternative should the Commission fail to act promptly and affirmatively on our proposals as explained below and advanced simultaneously herein in separate filings by RCA Globcom. These proposals are designed to afford RCA Globcom relief from the difficult situation in which it finds itself. In other words, RCA Global Communications primarily seeks other relief, which we believe to be preferable.

First, RCA Globcom seeks the repeal or rescission of the Commission decision which prohibits the carriers from providing free direct access to customers in the hinterland. We believe that such free direct access can be provided at costs substantially below those involved in the current divisions with Western Union. Accordingly, this course of action would enable us to retain additional revenues to meet the costs of providing the service without increased charges to the public. We see no reason why the public should be penalized with additional charges in order to maintain Western Union as the sole provider of domestic interconnected telegram facilities for the IRC's. Secondly, in connection with and subsidiary to free direct access, RCA Globcom seeks the right to interconnect fully and freely with other domestic carriers for the origination and termination of international message traffic. Current negotiations indicate to RCA Global Communications that authorization to proceed in this matter would enable RCA Global Communications to make agreements for the origination and termination of traffic at divisions more favorable than those now demanded and received by Western Union. As is set forth more fully in the pleadings filed in support of this relief, it is our position that the public interest would be serviced by the introduction of an alternative for the domestic pickup and delivery of international traffic. We must note, however, that although this request is an important one, it would not provide the minimal relief sought as would either free direct access or rescission of the 3 cents increase in the divisions referred to below.

Thirdly, we request the Commission to rescind the increased division of 3 cents per ordinary word with Western Union. This would afford the same number of dollars as the rate increase proposed herein without either requiring the public to pay more or incurring the danger of decreasing traffic volume because of increased rates.

As noted above, we believe the record shows that when viewed on any basis whatever there are losses suffered by RCA Globcom from the handling of international telegraph traffic. Prompt relief is essential to at least reduce the magnitude of these losses. RCA Global Communications believes that the most effective and efficient as well as least costly method of providing such relief is to be found in free direct access or rescission of the 3 cents increase in the divisions or a combination thereof. If, in fact, the Commission grants such relief, RCA Globcom commits itself to seek authority of the Commission to withdraw the increased rates being filed herewith. On the other hand if the Commission should deny the alternative relief sought, or unduly defer action on the request, RCA Globcom proposes in the absence of other, supervening factors to pursue its current filing and seek to have the increased rates become effective.

It is recognized that there may be a question with respect to proper procedures for the filing of this tariff in light of the manner in which the rates currently effective were fixed and determined. Accordingly, if the Commission deems a pleading pursuant to Section 205 of the Communications Act necessary as a prerequisite for the handling of this tariff filing, there is submitted herewith under separate cover an appropriate motion.

Attached herewith is the supporting data required in connection with this filing pursuant to Section 61.38 of the Commission's rules.

Acknowledgement and date of receipt of this filing are requested. A duplicate letter of transmittal is attached for this purpose. All correspondence and inquires in connection with this filing should be addressed to Mr. A.E. Schwamberger, Director, Regulatory Affairs, RCA Global Communications, Inc., 60 Broad Street, New York, New York 10004.

Very truly yours,

AHE/yv
Attachments

Company RCA GLOBAL COMMUNICATIONS, INC. (1104

Transmittal No. 4260 Date Received

New Tariff Tariff Revision 352nd Rev. Page

Issuing Date August 19, 1977 Effective Date January 1, 1978

1. An explanation of the changed matter.	X	
2. The reason for the filing.	X	
3. The basis of ratemaking employed.	X	
4. A cost of service study for all elements of cost for the most recent 12 month period (changed matter only).	X	
5. A study containing a projection of cost for a 3 year period beginning at the date of the filing of the tariff matter.	X	
6. Estimates of the effect of the changed matter upon: a) traffic and revenues from the service to which the changed matter applies.	X	
b) traffic and revenue from other service classifications of the carrier.	X	
c) the overall traffic and revenue of the carrier.	X	
7. Complete explanation of the bases for the estimates.	X	
8. Two sets of working papers which support the information in items 4 through 6.	X	

INCREASE IN MESSAGE TELEGRAPH RATES
FROM UNITED STATES TO OVERSEAS POINTS

1. Explanation of changed matter - An explanation of the changed matter is contained in the attached transmittal and supporting data.
2. The reason for the filing - The reason for the filing is explained in the attached transmittal and the "Motion For Acceptance of Tariff" being filed simultaneously.
3. The basis of ratemaking employed - The revenue requirement was developed on the basis of cost allocation established by the Commission in Docket #20778. RCA Globcom has undertaken preliminary revenue and cost studies and applied the results on a fully distributed basis to telegram service.
4. A cost of service study for the most recent 12 month period - Attached.
5. Projection of costs for a 3 year period - Three year projections based on actual cost of service and adjusted to support 3 year volume projections. Labor contracts, inflation and mode of operation changes.
6. Estimates of the effect of the changed matter - No major effect will be felt on other services as explained in rationale attached.
7. Complete explanation of the basis for the estimated - See rationale and assumption attached.
8. Working papers - Attached.

Rationale and Assumptions
for
Development of Supportive 61.38 Data

In the development of the supportive 61.38 data for this filing, a deliberate effort was made to resolve all questionable items of expense against RCA Globcom and questionable items of revenue in favor of Globcom. For example, the approval of a rate increase for message telegram service would, in all likelihood, create a situation where message telegram volumes would diminish by virtue of a shift to relatively less expensive alternate communications services. For purposes of the accompanying data, however, we have, in line with our approach, not included this factor as one of our assumptions since its inclusion would only serve to indicate a further increase in the level of loss to RCA Globcom in providing message telegram service. Thus any diversion is expected to be minimal and the effect thereof would be an increase in loss versus the impact projected herein. Our figures herein show the results of adding back possible benefits to Globcom of restoring the original IQB Formula. In a like manner, we are not making any claim with respect to certain short term impacts from certain depreciation items and costs of the company's employee redundancy program. We have projected a declining market for message telegram service over the three-year period illustrated based on studies of recent U.S. industry and Globcom statistics. We have assumed neither any significant increase nor decline in market penetration. Growth rate projections reflect a negative 3% in 1977, negative 3.5% in 1978 and negative 3% in 1979. This tracks with recent industry experience. The additional

C1107

half percent decline in 1978 is anticipated as a result of start-up of operations by U.S. banks with SWIFT (The Society for Worldwide Interbank Financial Telecommunications), which service will have an adverse impact on the message telegram market. Our projections reflect an assumed retained revenue per message of $2.19. This amount was derived by multiplying the volume of traffic handled by RCA Globcom during 1976 by an average of 39.7 words per message and an average retained revenue of $.055 per word.

With respect specifically to cost factors experienced or projected, the following is pertinent for the noted time period:

1976 - Based on actual expense for full year 1976.
Allocated to telegram service in accordance with the requirements established by the Commission in Docket #20773. Costs were allocated on a fully distributed basis based on preliminary results of RCA Globcom's Revenue and Cost Studies.

1977 - Based on June year-to-date actual expenses.
1977 cost allocations were developed using the requirements established by the Commission in Docket #20773. The cost allocations methodology was then applied to operating managers' best estimates of projected operating costs. These results were then annualized for the full year projection, normalized for aberrations which occurred in the first half, but are not expected to be experienced in the remainder of the year.

1978 - Assumes full year operation of RCA Globcom's automated message telegram computer. Based on 1977 projections, average expense was escalated at approximately 9%.

1979 - Based on 1978 projections, average expense was escalated at approximately 9%.

C1109

FINANCIAL DATA

SUPPORTING FCC RATE INCREASE

FILING

C1110

RCA GLOBAL COMMUNICATIONS, INC.
PROJECTED REVENUES/MESSAGES AND IMPACT
OF 3¢/WORD RATE INCREASE

	Actual 1976	Year 1 (1977)	Year 2 (1978)	Year 3 (1979)	3 Year Total
Revenues Absent Quota Formula Revision	16 343	15 850	15 275	14 800	45 925
Messages Absent Quota Formula Revision		7 240	6 975	6 760	20 975
Revenue Requirement		21 708	21 363	22 945	66 016
Revenue Shortfall * Before Rate Increase		(5 858)	(6 088)	(8 145)	(20 091)
Anticipated Revenue From 3¢/Word Rate Increase		2 400	2 300	2 200	6 900
Revenue Shortfall After Rate Increase		(3 458)	(3 788)	(5 945)	(13 191)

* The figures contained on this and succeeding pages do not include provision for any expenses attributable to employee severance or accelerated depreciation. The amounts of such expenses have not been definitively determined. In any event, their inclusion herein would worsen the loss situation shown above which is, in effect, the most favorable analysis possible in terms of operating loss.

C1111

RCA GLOBAL COMMUNICATIONS, INC.
TELEGRAM REVENUE REQUIREMENT
THREE YEAR PROJECTION

($ 000)

	Year 1 (1977)	Year 2 (1978)	Year 3 (1979)	3 Year Total
Annual Operating Expenses				
Direct Labor	8 163	7 549	8 304	24 016
Indirect Labor	5 585	5 864	6 450	17 899
Labor Transfers	(530)	(557)	(613)	(1 700)
Net Labor	13 218	12 856	14 141	40 215
Travel & Reimbursables	139	149	159	447
Rent & Power	1 084	903	955	2 942
Telephone	252	270	289	811
O&M-Supplies, etc.	1 818	1 917	2 023	5 758
Depreciation	1 321	1 546	1 621	4 488
Other Non-Controllables	471	510	552	1 533
Total Operating Expenses	18 303	18 151	19 740	56 194
Return Requirement	3 405	3 212	3 205	9 822
Annual Revenue Requirement	21 708	21 363	22 945	66 016

NOTES:

1) Labor includes Employee Service Expense of 24%. (It is expected that the projected ESE rates will be higher than 24%.)
2) Selling, General and Administrative Expenses included in above expense categories.

C1112

RCA GLOBAL COMMUNICATIONS, INC.
TELEGRAM P&L STATEMENT
FOR YEAR-END DEC. 31, 1976

	($ 000)
Revenues	16 473
Expenses	
Direct Labor	7 983
Indirect Labor	6 112
Labor Transfers	(687)
Net Labor	13 408
Travel & Reimburseables	152
Rent & Power	816
Telephone	306
O&M - Supplies, Etc.	2 022
Depreciation	1 363
Other Non-Controllables	423
Total Expenses	18 490
Operating Profit/(Loss)	(2 017)

Note: 1) Labor includes employee service expense of 22.5%
2) Selling, general & administrative expenses included in above expense categories

C1113

RCA GLOBAL COMMUNICATIONS, INC.
TELEGRAM RATE BASE
THREE YEAR PROJECTION

($ 000)	YEAR 1 (1977)	YEAR 2 (1978)	YEAR 3 (1979)
Investment (First Cost)	19 160	21 410	22 160
Depreciation Reserve (30%) *	(5 748)	(6 423)	(6 648)
Net Investment	13 412	14 887	15 512
Construction in Process	3 000	750	-0-
Working Capital	2 507	2 109	2 295
Total Rate Base	18 919	17 846	17 807
Return Requirement	3 405	3 212	3 205

* Represents average depreciation reserve for total Globcom

C1114

RCA GLOBAL COMMUNICATIONS, INC.
TELEGRAM EXPENSE PROJECTIONS
FOR THREE YEAR PERIOD

FCC. ACCT.	FCC DESCRIPTION	YEAR 1 (1977)	YEAR 2 (1978)	YEAR 3 (1979)
4110	Supervision of maintenance	$ 87,979	$ 92,375	$ 101,616
4115	Maintenance of real estate	-145,628	-152,894	-166,770
4120	Maintenance of fixed and land station aerial systems and lines	10,191	10,682	11,712
4125	Maintenance of fixed and land station transmission equipment	408,497	426,288	462,471
4126	Maintenance of ocean cable	14,621	15,644	16,739
4130	Maintenance of furniture and office equipment	21,273	22,694	24,216
4132	Electron-tube replacements	-739	-791	-846
4210	Supervision of operations	1,767,073	1,855,427	2,040,970
4215	Operators' wages	3,732,968	3,332,939	3,666,233
4216	Wages of station attendants	943,246	950,490	1,045,539
4222	Wages of operating-office clerks	2,570,156	2,326,024	2,558,626
4225	Operating power	429,395	335,523	348,380
4230	Traffic damages	2,132	2,282	2,441
4240	Telephone service; message transmission	96,731	103,502	110,747
4243	Rent for operating offices	405,738	300,390	321,417
4245	Rent for other facilities	458,140	490,210	524,524
4250	Advertising	99,319	106,271	113,702
4255	Soliciting	916,574	966,765	1,052,327
4270	Commissions - Dr.	1,612	1,724	1,845
4281	Messengers' wages	677,369	688,986	757,885
4283	Messengers' uniform expense	1,194	1,276	1,366
4289	Other messenger service expense	55,931	59,846	64,036
4290	Other employees' wages	534,544	561,272	617,399
4295	Supplies; operating offices	330,052	330,052	330,052
4299	Other conducting-operations expense	221,247	235,607	253,876
4310	Salaries of general officers and executives	148,552	155,979	171,577
4315	Expenses of general officers and executives	12,722	13,612	14,565
4320	Salaries of general office employees	1,837,209	1,929,069	2,121,976
4325	Expenses of general office employees	27,441	29,362	31,417
4399	Other administrative expenses	179,171	191,713	205,133
4410	Legal services	106,656	114,122	122,110
4415	General services, licenses, and royalties - Dr.	89,154	95,395	102,072
4420	General services, licenses, and royalties - Cr.	-89,213	-89,213	-89,213
4425	Insurance	14,432	15,442	16,523

continued

C1115

RCA GLOBAL COMMUNICATIONS, INC.
TELEGRAM EXPENSE PROJECTIONS
FOR THREE YEAR PERIOD

FCC. ACCT.	FCC DESCRIPTION	YEAR 1 (1977)	YEAR 2 (1978)	YEAR 3 (1979)
4450	Rent for offices	80,942	86,608	92,671
4455	Other rents	100,328	107,351	114,865
4470	Supplies	223,644	239,299	256,050
4475	Training employees	65,751	70,047	75,432
4480	House service	103,228	110,453	118,185
4499	Other general expenses	73,361	78,497	83,991
4910	Depreciation	1,320,554	1,545,554	1,620,554
4932	Other taxes; operating	321,675	344,192	368,286
4935	Uncollectible revenues	45,990	49,209	52,654
4999	Other operating revenue deductions	1,082	1,158	1,239
TOTAL		$18,302,294	$18,150,433	$19,740,590

C1116

RCA GLOBAL COMMUNICATIONS, INC.
TELEGRAM EXPENSES
FOR YEAR-END DECEMBER 31, 1976

FCC. ACCT.	FCC DESCRIPTION	1976 ACTUAL
4110	Supervision of maintenance	$ 55,109
4115	Maintenance of real estate	-21,452
4120	Maintenance of fixed and land station aerial systems and lines	6,432
4125	Maintenance of fixed and land station transmission equipment	346,188
4126	Maintenance of ocean cable	12,010
4130	Maintenance of furniture and office equipment	13,771
4132	Electron-tube replacements	624
4210	Supervision of operations	1,708,486
4215	Operators' wages	3,756,311
4216	Wages of station attendants	605,665
4222	Wages of operating-office clerks	2,798,602
4225	Operating power	266,047
4230	Traffic damages	23,275
4240	Telephone service; message transmission	118,417
4243	Rent for operating offices	291,373
4245	Rent for other facilities	498,503
4250	Advertising	117,949
4255	Soliciting	1,026,581
4260	Obtaining stock and commercial news	204
4270	Commissions - Dr.	3,413
4281	Messengers' wages	662,841
4283	Messengers' uniform expense	2,030
4289	Other messenger service expense	53,690
4290	Other employees' wages	554,749
4295	Supplies; operating offices	380,910
4299	Other conducting-operations expense	356,913
4310	Salaries of general officers and executives	193,000
4315	Expenses of general officers and executives	34,706
4320	Salaries of general office employees	2,005,496
4325	Expenses of general office employees	-21,552
4399	Other administrative expenses	144,674
4410	Legal services	223,182
4415	General services, licenses, and royalties - Dr.	72,120
4420	General services, licenses, and royalties - Cr.	-132,478

-continued-

C1117

RCA GLOBAL COMMUNICATIONS, INC.
TELEGRAM EXPENSES
FOR YEAR-END DECEMBER 31, 1976

FCC. ACCT.	FCC DESCRIPTION	1976 ACTUAL
4425	Insurance.	24,463
4450	Rent for offices	57,262
4455	Other rents	75,011
4470	Supplies	163,265
4475	Training employees	118,038
4480	House service	91,010
4499	Other general expenses	132,520
4910	Depreciation	1,362,575
4932	Other taxes; operating	261,348
4935	Uncollectible revenues	43,800
4999	Other operating revenue deductions	3,187
TOTAL		$18,490,268

western union
TELEGRAPH COMPANY

C1118

M. KESTENBAUM
ASSOCIATE COUNSEL

November 7, 1977

Mr. Walter R. Hinchman
Chief, Common Carrier Bureau
Federal Communications Commission
Washington, D. C. 20554

Re: International Formula
Docket No. 19660

Dear Mr. Hinchman:

In response to your letter of October 7, 1977, Western Union would advise that it does not intend to file additional formal comments in the above-captioned proceeding. We wish, nevertheless, to reaffirm our view that the existing formula mode of routing international cablefram traffic (Western Union takes no position as to the precise formula to be implemented or the appropriateness of the interim formula per se) should be continued. For reasons explained in our original Comments (dated April 2, 1976), Western Union believes that the tentative proposal for required customer routings will prove to be uneconomic and, more than likely, completely unworkable.

The equipment necessary to sort international cablegram traffic on a fully automated basis was placed on line -- as promised by Western Union -- by April 1, 1977. There have been no serious start-up problems and Western Union's automated sorting system has functioned extremely well. Installation and other costs related to automated distribution have already been incurred and paid for. The operating expenses required to continue to distribute traffic automatically are relatively minor (approximately $50,000 per year) particularly when compared to the millions of dollars required to implement an all-routed solution.

Yours truly,

Leon M. Kestenbaum
Associate Counsel

cc: All Parties

OFFICE OF THE GENERAL COUNSEL · REGULATORY DIVISION
SUITE 1001, 1626 K STREET N. W., WASHINGTON, D. C. 20006

(202) 624-0141

C1119

Telephone
212 – 425-3461

INTERNATIONAL QUOTA BUREAU

26 BROADWAY, NEW YORK, N. Y. 10004

OPERATING FOR THE INTERNATIONAL FORMULA COMMITTEE REPRESENTING
ALL AMERICA CABLES AND RADIO, INC. • CANADIAN NATIONAL RAILWAY COMPANY • CANADIAN PACIFIC RAILWAY COMPANY
THE COMMERCIAL CABLE COMPANY • GLOBE WIRELESS LTD. • MACKAY RADIO AND TELEGRAPH COMPANY
RCA COMMUNICATIONS, INC. • RADIOMARINE CORPORATION OF AMERICA • TRT TELECOMMUNICATIONS CORPORATION
UNITED STATES-LIBERIA RADIO CORPORATION • WESTERN UNION INTERNATIONAL, INC.

Memorandum for:

September 20, 1977

Mr. J. F. Frech, United States-Liberia Radio Corporation
Mr. G. F. McGuire, The Western Union Telegraph Company
Mr. J. R. Moman, TRT Telecommunications Corporation
Mr. E. W. Peterson, RCA Global Communications, Inc.
Mr. T. J. Reilly, Federal Communications Commission
Mr. R. H. Thomas, Western Union International, Inc.
Mr. R. Treglos, French Telegraph Cable Company
Mr. W. S. Wheatley, Jr., ITT World Communications Inc.

107. Distribution of Bureau Reports.

1) Copies of the IQB report on outbound international messages under the formula for the month of June 1977, and year-to-date January-June 1977, are distributed hereby. September 20, 1977, is the date of issuance of this report.

2) Instances in which unrouted transfer messages (UNRTD. TFRS.) as reported by WUTC for the month of June 1977 exceed routed and unrouted transfer messages (TOTAL TFRS.) as reported by the IRCs, will be furnished in detail separately to the respective carriers.

John M. Munroe, Manager

Copy for: Mr. R. G. Brolly, ITT World Communications Inc.
Mr. J. B. Busch, The Western Union Telegraph Company
Mr. J. J. Celentano, RCA Global Communications, Inc.
Mr. F. R. Conrad, Western Union International, Inc.
Mrs. M. Graham, ITT World Communications Inc.
Mr. D. C. Jacquet, French Telegraph Cable Company
Mr. J. Wiesel, French Telegraph Cable Company

OUTBOUND INTERNATIONAL MESSAGES ROUTED UNDER THE FCC TARIFF — ALL ORIGINS TO RECAP ALL DESTINATIONS — PAGE 1 OF 184

PREPARED BY IOB COPY TO FTC ITT RCA TRT WUI WUTC

(1120

77	CARRIER	IRC PICKUPS		TOTAL TFRS.		PICKUPS & TFRS.		UNRTD. TFRS.		ROUTED	
FEB	FTC										
	ITT										
	RCA										
	TRT										
	USL										
	WUI										
	ALL										
MAR	FTC	6	860	5	349	12	109	5	047	7	062
	ITT	77	700	84	672	162	372	70	254	92	118
	RCA	89	584	80	556	170	140	69	047	101	093
	TRT	22	243	12	971	35	214	11	409	23	805
	USL		339		96		435		81		354
	WUI	81	577	73	923	155	500	61	322	94	178
	ALL	278	353	257	417	535	770	217	160	318	610
APR	FTC	8	760	5	452	14	212	5	155	9	057
	ITT	96	723	106	025	202	748	84	003	118	745
	RCA	107	135	99	599	206	734	82	457	124	277
	TRT	25	933	13	208	39	141	11	270	27	871
	USL		396		97		493		84		409
	WUI	97	881	88	041	185	922	69	987	115	935
	ALL	336	828	312	422	649	250	252	956	396	294
MAY	FTC	7	871	3	479	11	350	3	291	8	059
	ITT	85	243	98	657	183	900	82	117	101	783
	RCA	98	480	98	488	196	968	84	747	112	221
	TRT	22	730	7	835	30	565	6	900	23	665
	USL		350		36		386		24		362
	WUI	87	959	76	790	164	749	62	528	102	221
	ALL	302	633	285	285	587	918	239	607	348	311
JUN	FTC	7	505	5	790	13	295	5	406	7	889
	ITT	90	592	103	885	194	477	86	277	108	200
	RCA	97	140	104	074	201	214	88	131	113	083
	TRT	33	658	24	312	57	970	21	848	36	122
	USL		331		75		406		61		345
	WUI	87	449	88	314	175	763	17	588	103	175
	ALL	316	675	326	450	643	125	274	311	368	814
JUL	FTC	9	481	5	296	14	777	4	909	9	868
	ITT	89	872	104	323	194	195	87	371	106	824
	RCA	99	130	105	467	204	597	90	035	114	562
	TRT	28	219	14	360	42	579	13	035	29	544
	USL		382		30		412		20		392
	WUI	90	841	91	264	182	105	72	987	109	118
	ALL	317	925	320	740	638	665	268	357	370	209

77	CARRIER	IRC PICKUPS		TOTAL TFRS.		PICKUPS & TFRS.		UNRTD. TFRS.		UNRTD. %	CUR. Q %	ROUTED		RTD. %
JAN	FTC	6	373	5	940	12	313	5	754	3	2	6	559	
	ITT	84	391	91	974	176	365	75	677	32	33	100	688	
	RCA	100	141	86	176	186	317	73	508	31	33	112	809	
	TRT	23	376	14	477	37	853	12	893	6	5	24	960	
	USL		349		144		493		105				388	
	WUI	88	745	79	007	167	752	66	398	28	27	101	354	
	ALL	303	375	277	718	581	093	234	335			346	758	
JAN-FEB	FTC	13	233	11	189	24	422	10	801	3		13	621	
	ITT	162	091	176	646	338	737	145	931	32		192	806	
	RCA	189	725	166	732	356	457	142	555	32		213	902	
	TRT	45	669	27	398	73	067	24	302	5		48	765	
	USL		688		240		928		186				742	
	WUI	170	322	157	930	323	252	127	720	28		195	532	
	ALL	581	728	535	135	1116	363	451	495			665	368	
JAN-MAR	FTC	21	993	16	641	38	634	15	956	2		22	678	
	ITT	258	814	282	671	541	485	229	934	33		311	551	
	RCA	296	860	266	331	563	191	225	012	32		338	179	
	TRT	71	602	40	606	112	208	35	572	5		76	636	
	USL		1084		337		1421		270				1151	
	WUI	268	203	240	971	509	174	197	707	28		311	467	
	ALL	918	556	847	557	1766	113	704	451			1061	662	
JAN-APR	FTC	29	864	20	120	49	984	19	247	2		30	737	
	ITT	344	057	381	328	725	385	312	051	33		413	334	
	RCA	395	340	364	819	760	159	309	759	33		450	400	
	TRT	94	332	48	441	142	773	42	472	4		100	301	
	USL	1	434		373	1	807		294			1	513	
	WUI	356	162	317	761	673	923	260	235	28		413	688	
	ALL	1221	189	1132	842	2354	031	944	058			1409	973	
JAN-MAY	FTC	37	369	25	910	63	279	24	653	2		38	626	
	ITT	434	649	485	213	919	862	398	328	33		521	534	
	RCA	492	480	468	893	961	373	397	890	33		563	483	
	TRT	127	990	72	753	200	743	64	320	5		136	423	
	USL	1	765		448	2	213		355			1	858	
	WUI	443	611	406	075	849	686	332	823	27		516	863	
	ALL	1537	864	1459	292	2997	156	1218	369			1778	787	
JAN-JUN	FTC	46	850	31	206	78	056	29	562	2		48	494	
	ITT	524	521	589	536	1114	057	485	699	33		628	358	
	RCA	591	610	574	360	1165	970	487	925	33		678	045	
	TRT	156	209	87	113	243	322	77	355	5		165	967	
	USL	2	147		478	2	625		375			2	250	
	WUI	524	452	497	339	1031	791	405	810	27		625	981	
	ALL	1556	789	1780	072	3639	821	1486	734			2149	095	

SEP 20 1977 — AUG 8 1977 — AUG 8 1977 — JUL 25 1977 — JUN 24 1977 — MAY 25 1977

F.C.C. 75-1430

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of INTERNATIONAL RECORD CARRIERS' SCOPE OF OPERATIONS IN THE CONTINENTAL UNITED STATES, INCLUDING POSSIBLE REVISIONS TO THE FORMULA PRESCRIBED UNDER SECTION 222 OF THE COMMUNICATIONS ACT	Docket No. 19660 RM-690

REPORT AND ORDER AND NOTICE OF PROPOSED RULEMAKING

(Adopted: December 22, 1975; Released: January 7, 1976)

BY THE COMMISSION: COMMISSIONER HOOKS ISSUING A SEPARATE STATEMENT.

I. Preliminary Statement

1. This investigation and rulemaking proceeding was instituted in 1973 to determine whether the Commission should modify the present international formula which was prescribed in 1943. That formula governs distribution by Western Union Telegraph Company (WU) among the international record carriers (IRCs) of outbound, unrouted international message telegraph traffic. Our reasons for instituting this proceeding are fully presented at 43 FCC 1174 (1973), (Designation Order). In a subsequent order, 47 FCC 2d 225 (1974), we modified our procedures because of a controversy among the parties concerning the reliability of information submitted by the International Quota Bureau (IQB).[1]

2. Pursuant to our orders, Statements of Fact and Memorandums of Law were filed on July 10, 1974 by Canadian National Railway (CNR), Canadian Pacific, Ltd. (CPL), ITT, RCA Global Communications, Inc. (RCA), TRT Telecommunications Corporation (TRT), Western Union International, Inc. (WUI), and WU.[2] In addition to these Statements, Comsat General Corp. on July 8, 1974 filed Comments and on August 30, 1974 a Reply, in which it raised the question whether the formula governing distribution of outbound message telegraph traffic destined to ships at sea (maritime formula) should be revised. On August 19, 1974, all respondents except CNR and CPL filed Responses to the Initial Statements and, on September 6, 1974, Replies. During April, 1975, WU submitted to the parties and the Commission the results of

[1] The IQB is the professional staff of the International Formula Committee (IFC), a body composed of representatives of the IRCs entitled to traffic under the formula. Section XI of the formula places administration of its provisions with the IFC. In carrying out its function to instruct WU to which carriers it is to distribute traffic, the IQB maintains data on traffic volumes and distribution. The Designation Order made the IFC and IQB parties for the purpose of providing the respondents with data for their use in responding to the designated issues. 43 FCC 2d at 1182.

[2] The French Telegraph Cable Co. (FTC) and United States-Liberia Radio Corporation (U.S. Liberia) were also named as parties to this inquiry. Both carriers filed statements that they did not wish to participate in the inquiry, but stood ready to implement any decision of the Commission.

its study of outbound message
study, the parties filed on Augu
and on August 28, 1975, Supple
formal pleadings, statistical data
mitted for consideration in this i
into the pleadings of RCA and I
Policy Support Division, Office o
Department o. Commerce (OT),
Working Draft, The International
routed Telegraph Messages, date
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Designation Order, constitute the
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its study of outbound message traffic. Based on the results of this study, the parties filed on August 1, 1975, Supplementary Comments and on August 28, 1975, Supplemental Replies. In addition to these formal pleadings, statistical data were submitted by the IQB. Not submitted for consideration in this inquiry, but incorporated by reference into the pleadings of RCA and ITT, was a document prepared by the Policy Support Division, Office of Telecommunications, United States Department of Commerce (OT), entitled Policy Research Estimate, Working Draft, The International Formula for the Distribution of Unrouted Telegraph Messages, dated June 2, 1975. To the extent useful in considering the arguments of the parties, we will take notice of this document. The foregoing items, plus the pleadings considered in the Designation Order, constitute the record for decision in this proceeding.

Summary

3. After considering the views of the parties and other material before us, we have concluded that the present method of distribution embodied in the international formula is unjust, unreasonable, inequitable and not in the public interest; and that the formula should therefore be replaced as provided below. In reaching this conclusion we find that the present formula, under the circumstances prevailing today, fails to meet the statutory standard in Section 222(e)(1) and 222(e)(3) either in concept or in operation. As we explain more fully below, the present formula, with its basic unit the quota system, represents a market-sharing device which is by definition antithetical to the free flow of competition which Congress sought to encourage and enhance. Whatever may have been the justification for this arrangement under the unique circumstances facing us in 1943, the present conditions in the industry and the economy generally indicate that such practices now work against the public interest. We have also found that the formula has not worked well in practice. Due to weaknesses in the formula structure and changes in the industry which the formula failed to predict or allow for, serious distortions have developed in the pattern of distribution which appear unlikely ever to correct themselves. These distortions have made the present formula inequitable as among the parties and have worked against the public's interest in a strong, efficient public message service. In these circumstances, we believe the formula has outlived its usefulness and should be repealed. In place of the present formula, we will place distribution of traffic on the choice of the customer. For reasons discussed fully below, however, we cannot move immediately to required customer routing. In the interim, we have prescribed a new formula which distributes unrouted traffic among the IRCs in the same proportions as each carrier handles routed traffic. In this way, the inequities of the present distribution will be eliminated and the carriers encouraged to seek specific routings from customers. In the material which follows we will set out (1) the historical background, (2) a summary of the contentions of the parties, (3) our findings with respect to the designated issues, (4) our conclusions with respect to the present formula, (5) the interim method of

distributing outbound traffic, and (6) the measures we intend to take toward implementation of the all-routed method of distribution.

A. Historical Background

4. The present international formula was prescribed in 1943 pursuant to Section 222(e)(1) of the Act[3] in connection with our approval of the plan of merger submitted by WU and the Postal Telegraph Cable Company (Postal). Section 222 had been added to the Act to permit merger of the two remaining domestic telegraph companies with extensive nationwide public message services. Congress imposed on the permission to merge ancillary restrictions to control the power WU would achieve by its consequent *de facto* domestic monopoly. For present purposes, the two relevant restraints are the divestment requirement in Section 222(c)(2) and the requirement of Section 222(e)(1) for a formula to govern distribution of traffic by WU among the IRCs. These requirements were occasioned by the fact that, prior to merger, WU operated an extensive international message telegraph network (WU Cables Division) in addition to its domestic network. As a condition of merger, WU was required to divest itself of its international facilities. However, because WU was subject to certain legal commitments, Congress believed that divestment might be delayed. For this reason, Congress did not make divestment a pre-condition of merger.[4] In the interim, Congress imposed a requirement for a formula to govern distribution of traffic which would prevent WU from using its domestic monopoly power to the detriment of its international competitors.

5. Prior to the merger, RCA was the only IRC which maintained public offices in the main international terminal cities of New York and San Francisco. The others relied largely on connections with WU and Postal for the intra-United States handling of their overseas traffic. WU exchanged traffic between its domestic operations and its Cables Division. The component companies of ITT had similar arrangements with Postal, which until 1940 had been affiliated with ITT. Various IRCs also had arrangements with WU (domestic) for exchange of traffic to and from hinterland points. In addition, RCA and Mackay Radio & Telegraph Company (a predecessor constituent of ITT) also operated a few domestic radio circuits linking major cities, which they used chiefly for domestic handling of their international traffic. However, with the disappearance of Postal after the merger, and the termination of the Mackay and RCA domestic circuits during World War II, the IRCs after merger were dependent on WU for the domestic handling of their traffic.

6. To accomodate their concerns, the parties developed a formula based on quotas for each carrier which, by freezing the carriers' pre-

merger positions, would preve
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7. Beyond its basic features,
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traffic originating in the gateway
traffic). Instead, Schedule B to th
receive approximately 61.5% of V

[3] 47 U.S.C. § 222(e)(1) provides in pertinent part that

[i]n the case of any consolidation or merger of telegraph carriers pursuant to this section, the consolidated or merged carrier shall, . . . distribute among the international telegraph carriers telegraph traffic by wire or radio destined to points without the continental United States, and divide the charges for such traffic, in accordance with such just, reasonable, and equitable formula in the public interest as the interested carriers shall agree upon and the Commission shall approve. . . .

[4] 47 U.S.C. § 222(c)(2) provides in pertinent part that

[a]ny proposed consolidation . . . shall provide for the divestment of the international telegraph operations theretofore carried on by [WU], within a reasonable time . . . as soon as the legal obligations . . . [of WU] will permit.

[5] Section 222(e)(1) provides that the Commis
interested parties cannot agree upon one. Aft
proposal to us for review. In our review, we
agreement and modified them. For this reason
formula.

[6] Each IRC does not have a quota for every d
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[7] Because World War II had interrupted ser
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compensate for the fact that individual messag

[9] In 1943 the provision applied to WU's Cable
divested overseas facilities, WUI succeeded to

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merger positions, would prevent WU from favoring itself.[5] The formula divides international destination points into three "Areas"—"A" (Atlantic), "B" (Latin America), and "C" (Pacific)—grouped according to the facilities used to serve points within them and the carriers which then operated there. These Areas are broken down into a number of "Subareas." For the purpose of applying the quota system, the basic unit is the subarea. The formula also divided points of origin in the United States into two classes: (1) New York, San Francisco and Washington, D.C. (called "gateways") and (2) other United States points (called "hinterland"). Essentially, there are two separate formulas provided for—one for gateway-originated traffic and one for hinterland-originated traffic. Based on the above, the formula provides to named IRCs a quota for each category of traffic, for each subarea of destination, and for each recognized origin point.[6] A carrier's quota for each category of traffic is defined as the ratio of outbound traffic in that category handled by that carrier during 1942, to the total traffic handled that year by all carriers serving that point. Essentially, then, a carrier's quota represents its market share during the base period.[7] WU was directed to apply the quotas so that each eligible IRC received a proportion during the current period of "gross international tolls"[8] equal to its quota. There was, however, a problem inherent in the quota system arising from the fact that, irrespective of quotas, an IRC was to receive all traffic specifically routed by the sender via that carrier. Because of this feature, WU would be able to insert routings via WU Cables on any message and thereby divert traffic to its own facilities. To counter this, therefore, the formula provides a mechanism (balancing provision) designed to restore the general market shares. If a carrier exceeded its quota in any category solely from routed traffic, WU was to withhold from it an equivalent amount of unrouted traffic in other categories to balance the excess. If a carrier failed to receive its quota in a given month, the distribution was to be adjusted in later months to compensate it for the deficiency.

7. Beyond its basic features, the formula includes several special provisions aimed at particular problems or concerns of individual carriers. First, under the formula, RCA was entitled to receive specifically-routed traffic destined to Areas A and B; but received no unrouted traffic originating in the gateways (it does have quotas for hinterland traffic). Instead, Schedule B to the formula provided that RCA was to receive approximately 61.5% of WUI's quotas[9] for traffic destined to

[5] Section 222(e)(1) provides that the Commission shall prescribe a formula only in the event the interested parties cannot agree upon one. After reaching agreement, the parties submitted their proposal to us for review. In our review, we found objectionable certain features of the carrier agreement and modified them. For this reason, we prescribed rather than approved, the present formula.

[6] Each IRC does not have a quota for every destination point. Generally, a carrier received a quota if that carrier operated to individual points within the appropriate subarea at the time of the merger.

[7] Because World War II had interrupted service in 1942 to certain points, the formula provided that upon reestablishment of service quotas should be calculated with reference to the last 12-month period in which communications were conducted before interruption.

[8] The term "gross international tolls" is defined in the formula as (1) tolls payable to or collectible by an IRC at the U.S. gateways as if all traffic had originated at the gateway, less WU's payment for its landline haul (if the message did originate in the gateway) or (2) rental income for a leased circuit used to transmit traffic. *See* International Formula, Section V. This provision was designed to compensate for the fact that individual messages in a given category might differ in length.

[9] In 1943 the provision applied to WU's Cable Division. In 1961, when WU was formed from WU's divested overseas facilities, WUI succeeded to WU's obligations under this provision.

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the subareas, Continental Europe and Beyond the Continent, of Area A. RCA and WU had entered into a contract in 1931 providing for a similar shift of a block of traffic, apparently to compensate RCA for the fact that it turned over to WU more inbound traffic than it received outbound traffic from WU. Second, in 1943 United States traffic to certain points in Australasia routed via cable was generally handled by transfer to CNR or CPL, since the only direct cables to those points ran from Canada. To preserve the status quo with respect to this traffic, and to protect the rights of CPL under its contracts with Postal, the formula therefore provided a special arrangement for traffic to points in Australasia and the British West Indies. In general terms, the provision created a separate quota system applicable to these carriers designed to preserve their pre-merger position. Third, when we amended the formula in 1963 to reflect the creation of WUI, we added a special provision to designate particular WU public offices in New York, Washington, and San Francisco as WUI public offices, so that traffic filed in such offices would, absent a specific routing via another carrier, automatically be considered as specifically routed via WUI. This was done to spare WUI, in its early years, the expense of establishing its own offices and to put it in a position comparable to its competitors.

B. Contentions of the Parties

8. ITT listed certain features of the present formula which it characterized as particular problems requiring correction. *See* 43 FCC 2d at 1176. In commenting on ITT's arguments, TRT supported ITT's request for revision and included some specific matters which it believes need correction. In summary, the following is a list of the items which the proponents advanced as defects in the formula:

(1) The anticompetitive market share quota system;
(2) The "balancing system" which deprives a carrier of unrouted traffic when it increases its proportion of routed traffic;
(3) Basing quotas for unrouted traffic on the amount of self-generated traffic (gateways);
(4) Denying a carrier a share of unrouted traffic to a given point because it did not serve that point in the base year (1942);
(5) The lack of a provision for adjusting quotas to meet changing circumstances;
(6) The cumbersome and complex structure (separate quotas for gateway and hinterland, separate quotas for each class of traffic, etc.);
(7) The accumulated overages and deficiencies;
(8) Schedule B of the formula—special arrangement for RCA;
(9) The special quotas for CNR and CPL (Appendix 1 to the formula); and
(10) The designation of certain WU offices as WUI public offices.

RCA and WUI generally opposed the request for formula revision. They contended that the present formula works well in practice and asserted that neither ITT nor TRT has shown any evidence that the public interest has been disserved. The opponents also challenged the

assertion that the present formula
all carriers provide the highest qu
9. To remedy the alleged inequ
TRT and WU have advanced a num
distribution which they assert will
simplify administration. Briefly,
which ignores an IRC's self-origin
customer routings, and allocates u
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mended a distribution of unrouted t
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to each destination point. *Id.* at 1
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Third, as a fallback position, WU re
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10. In its Statement, ITT agreed
more logical and equitable basis for
but only with certain modifications:

(1) the distribution should be ba
according to the destinations
directly;
(2) self-generated gateway traf
pickups in the gateway as
included in determining traff
(3) calculation of proportionate s
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ITT also indicated that, in the interes
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suggested that eligibility be based on
tariffs. TRT also indicated that ITT's
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that point (again, based on its tariff)
method. TRT challenges ITT's propos

Since the formula is a rule within the meaning of S
ec. 5 U.S.C. § 551(4) (1971), ITT's request for amendr
Rulemaking. Accordingly, Section 553 requires that int
ent their views through written submissions, but does
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ews of other parties. There are no contested issues
esent formula meets the statutory standard and, if
ent that standard. Therefore, we conclude that no par
g case and that a trial-type evidentiary hearing,
uired by the Communications Act and the APA no
ere as. Cf. *Bell Telephone Company of Pennsylvan*
Co. Accordingly, we will deny the request.

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assertion that the present formula stifles competition and noted that all carriers provide the highest quality service to the public.[10]

9. To remedy the alleged inequities of the present formula, ITT, TRT and WU have advanced a number of specific proposals for a new distribution which they assert will better serve the public interest and simplify administration. Briefly, ITT recommended a distribution which ignores an IRC's self-originated traffic, directs WU to honor customer routings, and allocates unrouted traffic equally among all IRCs authorized to serve the destination point directly. TRT recommended a distribution of unrouted traffic based on each carrier's share of routed WU transfer traffic (ignoring self-originated routed traffic) to each destination point. *Id.* at 1179. WU, reflecting its desire to simplify or eliminate its role in administering the formula, advanced three alternative proposals. First, WU suggested replacement of a formula with a distribution based on a requirement for specific customer routings. Second, WU suggests that if a formula must be retained, then it should be permitted to transfer all unrouted traffic to the IQB or some other representative of the IRCs for distribution. Third, as a fallback position, WU requests that it be allowed to transfer all unrouted traffic to a given area to only one selected IRC. *Id.* at 1178.

10. In its Statement, ITT agreed that TRT's proposal might be a more logical and equitable basis for distribution of unrouted traffic; but only with certain modifications:

(1) the distribution should be based on a country-by-country basis according to the destinations a carrier is authorized to serve directly;
(2) self-generated gateway traffic could be excluded, but WU pickups in the gateway as well as the hinterland should be included in determining traffic percentages; and
(3) calculation of proportionate shares should be based on an historical period, but should be updated every six months (with a six-month lag to allow for preparation of the calculations).

ITT also indicated that, in the interest of simplicity, the WU proposal to distribute all unrouted traffic to a given area to one IRC would be acceptable, so long as each carrier received its proportionate share overall. TRT reiterated its position that unrouted traffic to each destination should be distributed in the same proportions as routed, and suggested that eligibility be based on the points a carrier lists in its tariffs. TRT also indicated that ITT's original proposal to divide unrouted traffic to every destination equally among the carriers serving that point (again, based on its tariff) would also be a fair and simple method. TRT challenges ITT's proposal to base distribution on direct

[10] Since the formula is a rule within the meaning of Section 551(4) of the Administrative Procedure Act, 5 U.S.C. § 551(4) (1971), ITT's request for amendment of the formula constitutes a Petition for Rulemaking. Accordingly, Section 553 requires that interested parties be given opportunity to present their views through written submissions, but does not require trial-type hearings. In the present case, all interested parties have been given opportunity to present their views and to challenge the views of other parties. There are no contested issues of fact; only the legal questions whether the present formula meets the statutory standard and, if it does not, what method of distribution will meet that standard. Therefore, we conclude that no party has been prejudiced by our procedures in this case and that a trial-type evidentiary hearing, as requested by RCA and WUI, is neither required by the Communications Act and the APA nor necessary to the resolution of the question before us. Cf. *Bell Telephone Company of Pennsylvania* v. *F.C.C.*, 503 F. 2d 1250, 1265–6 (3d Cir. 1975). Accordingly, we will deny the request.

service on the grounds that all carriers compete for traffic to the points they serve irrespective of whether those points are served directly or indirectly. In its Supplemental Response, ITT further modified its position to indicate that a distribution on a world-wide, rather than individual destinations, would be equitable; and would satisfy WU's desire for an easily-administered formula. Under this proposal, there would be a single world-wide distribution of unrouted traffic, regardless of class, based on each carrier's percentage share of routed WU transfers (both gateway and hinterland origins).

11. In general, RCA and WUI argue that the above proposals are no less arbitrary than the present formula and cannot be shown to serve the public interest any better. Further, since all the proposals are geared to increasing competition among the IRCs, they may actually be detrimental to that interest. In this connection, they note that one of the features of the present formula we specified in our order prescribing it was that, by reducing solicitation efforts, it would hold down carrier costs. In their view, the inevitable consequence of any of these proposals would be an increase in carrier solicitation efforts which would increase costs without improving service; and, since message service traffic volume is static or declining, the increased costs would result in increased usage charges.

12. *WUI Counterproposals.* In its Supplemental Comments, WUI included three proposals of its own for resolution of the formula controversy. First, it suggested that the proposals for amendment of the formula be submitted to the IFC.[11] A pre-condition to this, however, would be equalization of the voting strength of the various members of the IFC. ITT has four votes (based on four constituent companies) and RCA has two (its own and that of Radiomarine Corp.), while the other carriers have only one vote each. If this situation were rectified, the matter could be submitted to the carriers for resolution, with the active participation of the Commission staff. Second, WUI suggests that unrouted WU transfer traffic could be distributed in the ratio of unrouted traffic distributed during the period of the WU study. Routed transfers and self-originated traffic would be ignored. Third, WUI suggests that the separate gateway and hinterland quotas be replaced by one nationwide quota. In connection with the proposal, WUI would open its own public offices and abandon the designated WU offices, thereby placing all IRCs on an equal footing. The quotas would be calculated according to the number of messages, relying on random distribution to assure that all carriers get a fair mix of long and short messages. WUI also suggests that all classes of messages be treated as a unit, thus simplifying application of quotas. Schedule B would also be eliminated to place all IRCs in the same position. Next, WUI suggests replacing areas A, B and C and all subareas with a distribution based on each destination country (the quota would be the same for each point as that of the subarea of which it presently is a part). Next, WUI would eliminate the quotas for CNR and CPL and remove their obligations for payment of the expenses associated with formula operation. Finally, WUI suggests that all RCA gateway traffic to areas A

[11] Section XI of the present formula provides that
[i]n the event there is disagreement among the members of the [IFC] with respect to any feature of the distribution of traffic under the formula, the disagreement shall be submitted to the interested carriers, including [WU] . . .

and B be counted in its quotas (R
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originated unrouted traffic it no
13. TRT opposes all of the WU
permit WUI to continue to receiv
under the present formula. RCA
proposals, but opposes the third
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ratios in the WU study would elim
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which undoubtedly would increase
under ITT's proposal and the ef
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which to resolve the formula inqui
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are of the opinion that WUI's first
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II. Findings: The

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and B be counted in its quotas (RCA chose not to have gateway quotas to those points) to remove the disproportionate share of hinterland-originated unrouted traffic it now gets.

13. TRT opposes all of the WUI proposals on the grounds that they permit WUI to continue to receive most of the undue benefits it enjoys under the present formula. RCA supports the first and second WUI proposals, but opposes the third. RCA agrees that if voting power were equalized (including loss of one of RCA's two present votes), the IFC could be an effective forum for discussion of formula revision. As to WUI's second proposal, RCA believes it merits serious consideration. RCA states that basing distribution of unrouted traffic on the ratios in the WU study would eliminate ITT's most serious objection—shifting unrouted traffic away from carriers who increase their routed traffic. The advantage RCA sees in this is that solicitation expenses, which undoubtedly would increase, would be held at a lower level than under ITT's proposal and the effect on other IRCs of traffic shifts would be gradual. RCA objects, however, to the provision in WUI's third proposal for abolishing Schedule B. RCA believes that this proposal affects it alone and is in derogation of its contractual and formula rights, and that any change would have to be based on RCA performance data relating to the base period (1942) which no longer exists.

14. Since WUI's proposals were presented outside the designated issues, we will treat them separately. After considering the proposals, we have concluded that none of them represents a suitable basis on which to resolve the formula inquiry. Essentially, they represent little or no change over the present formula, at least in the short run. We are of the opinion that WUI's first proposal, even with equalized voting power, would not lead to an early resolution of the dispute. The various party interests are strongly entrenched, so that if there is any conclusion it is likely to be a compromise which ignores the public interest we have been considering in this proceeding. We note that the present formula was the result of a compromise and that many of the problems we have seen in it have come from the cumbersome structure thus developed. We see no compelling reasons to delay further the resolution of the issues, especially since the result may be an equally arbitrary compromise. Turning to the second WUI proposal, and ignoring that the study results may not be representative of a whole year's performance, we believe that this proposal would perpetuate for the foreseeable future the distortions of the present distribution. We note that while WUI's proposal allows for shifts of traffic, it does so only as the pool of unrouted traffic shrinks. While we agree that WUI's third proposal would result in simplification of quota administration, we must note that basing distribution on current market shares will not change any of the basic infirmities we see in the present formula. Accordingly, we cannot adopt any of WUI's proposals as submitted.

II. Findings: The Present Formula

15. To ascertain what has happened after 30 years of formula operation, we will look at the distribution presently being made under the formula (Issue one). For the purpose of our analysis we will use, as did the parties, the results of the WU 13-week study, supplemented by calendar-year 1974 figures reported by the carriers pursuant to Section 43.61 of the Commission's Rules and Regulations. 47 C.F.R. § 43.61 (1974). In 1974, a total of 8,640,411 telegraph messages (all classes)

were sent outbound from the United States; which yielded revenues of $21,486,392. In this connection, we note that traffic volumes in recent years have fluctuated only slightly. Therefore, we will assume that figures for 1975 will not significantly differ from the 1974 figures.

16. Applying the results of the WU study (one quarter's actual results) to the 1974 figures, it appears that approximately 5.6 million messages of the total are routed (WU transfers plus IRC pickups) and 3.0 million unrouted; or roughly two-thirds and one-third, respectively. Further, of the total outbound traffic, 3.9 million messages were handled by WU and the balance directly by the IRCs. Of the traffic handled by WU, 76.5% is unrouted and 23.5% routed. It is to the approximately 3.0 million unrouted messages that the formula applies and for which we must provide an equitable method of distribution in the public interest. As is apparent from these figures, unrouted traffic continues to represent a substantial portion of outbound traffic and the equitable division thereof a matter of consequence to the IRCs.

17. Table 1 shows a summary of the results of the WU study broken down for each carrier plus the figures reported by the IRCs in their Supplemental Comments for traffic directly picked up by them.

TABLE 1

Number of Outbound Messages
(WU Study)

Carrier	FTC	ITT	RCA	TRT
WU Transfers:				
Unrouted				
Exclusive	-	20,552	252,152	3,686
Non-Exclusive	-	58,204	79,332	5,852
Total:	-	78,576	331,484	9,538
Routed	503	69,328	64,179	10,740
Total Transfers	503	148,084	395,663	20,278
Direct Pickups:	[11,375]	363,272	361,216	60,639
Total Traffic	11,878	511,356	756,879	80,917

Carrier	US-L	WUI	OTHER (CNR&CPL)	ALL
WU Transfers:				
Unrouted				
Exclusive	1,459	149,977	-	427,826
Non-Exclusive	-	110,943	5,413	259,744
Total:	1,459	260,920	5,413	687,570
Routed	29	65,774	0	210,553
Total Transfers	1,488	326,694	5,413	898,123
Direct Pickups:	[737]	276,554	0	1,073,793
Total Traffic	2,225	603,248	5,413	1,971,916

Notes on Table 1:

Wu reported combined Unrouted Non-Exclusive traffic for all carriers. Allocation has been made on the basis of the relative distribution of traffic at the WU Minneapolis distribution office.

FTC and US-L did not supply information on their direct pickups. The bracketed figures shown for these carriers were calculated by applying the WU study results to the figures shown in their respective Section 43.61 responses.

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Table

	(1) Share of Routed WU Transfers	(2) Share of I Picku
Carrier:		
FTC	0.24	1.06
ITT	32.93	31.83
RCA	30.48	33.64
TRT	5.10	5.65
US-L	0.01	0.07
WUI	31.24	25.75
OTHER	-	-

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From the study, it can be seen that RCA receives more unrouted traffic (48.2%) under the formula than any other carrier, while overall it receives only 38.4% of total traffic and 30.5% of routed WU transfers. ITT, on the other hand, receives slightly more (32.9%) routed WU transfers; but receives 11.4% of unrouted transfers. Additionally, ITT picks up slightly more traffic directly from the public than does any other IRC (33.8%). WUI receives 30.6% of total traffic and 25.2% of routed transfers; but receives the second largest amount of unrouted transfers (37.9%). The situation with respect to TRT is equally dramatic. TRT's share of routed transfers is 5.1% and its share of direct pickups 5.6%. Yet TRT receives only 1.4% of unrouted traffic. Thus, under the present formula, it is apparent that for all carriers there is no relation (either direct or inverse) between a given carrier's handling of routed traffic and its handling of unrouted traffic.

18. The significance of this, and the importance of unrouted traffic, can be seen by comparing the overall market shares of the IRCs with their shares of routed traffic only:

Table 2

	(1) Share of Routed WU Transfers	(2) Share of Direct Pickups	(3) Share of Total Routed (1-2)	(4) Share Overall (%)
Carrier:				
FTC	0.24	1.06	0.92	.060
ITT	32.93	33.83	33.68	25.93
RCA	30.48	33.64	33.12	38.28
TRT	5.10	5.65	5.55	4.10
US-L	0.01	0.07	0.06	0.11
WUI	31.24	25.75	26.65	30.59
OTHER	-	-	-	0.27

As can be seen by comparing columns 3 and 4, there is a substantial difference between a carrier's handling of routed traffic and its handling of traffic overall. The difference between column 4 (overall share) and column 3 (share of routed) is the inclusion of unrouted traffic. RCA and ITT handle roughly equivalent levels of routed WU transfers and direct pickups but, when unrouted traffic is included, RCA's overall share dramatically increases. A similar phenomenon exists as between WUI and ITT. Overall, WUI handles significantly more (30.6%) traffic than does ITT (25.9%); but if unrouted traffic is eliminated, the situation is reversed. ITT handles 33.7% of routed traffic while WUI handles only 26.6%. Another interesting phenomenon shown by Table 2 is that the carriers' relative shares of routed WU transfers (column 1) correspond closely with their shares of direct pickups (column 2); in both categories, ITT receives more routed traffic than does any other carrier. It is only when unrouted traffic is

considered that the carriers' relative market positions change and ITT drops to third.[12]

19. The distortions in the present distribution may also be seen by the number of destinations to which one or another carrier receives all unrouted traffic (referred to as an exclusive point). From the data in Table 1, it appears that 62% of WU transfers and 25% of total outbound traffic falls into this category. Of the 52 destination subareas recognized by the formula, 46 are exclusive points for gateway-originated messages and 24 are exclusive points for hinterland messages. Since to most of these subareas some or all of the other IRCs handle routed traffic, these figures also indicate the lack of relationship between a carrier's handling of routed traffic and its handling of unrouted. Further, Table 1 also shows the extent to which RCA and WUI benefit from the existence of exclusive points. RCA receives 59% of all unrouted exclusive traffic, WUI receives 35%, while ITT receives less than 5%, and the other carriers each receive less than 1%. RCA receives virtually all unrouted traffic from both the gateways and hinterland to all subareas of Area C (Pacific). Additionally, RCA receives most unrouted traffic from the hinterland to subareas of Area A (RCA receives only routed traffic from the gateways to Areas A and B). WUI receives the bulk of gateway traffic to most areas of Area A, as well as some hinterland traffic and all unrouted to most points in South America. ITT receives most gateway traffic for Caribbean points and a few European points (including one high-volume point, France). TRT receives all unrouted only to the Bahamas, British Honduras, and Colombia. Proportioned distribution is in effect for only 15% of total traffic. If one considers that at its inception the present formula called for proportioned distribution of virtually all unrouted traffic, it is readily apparent that the present distribution has departed significantly from the drafters' intent.

20. The serious distortions in distribution patterns noted above evolved over 30 years of formula operation and resulted from a structural weakness in the formula itself. This weakness is the interrelationship of the balancing provisions and the overall direction that a carrier receive all traffic specifically routed via it. Since the formula sought to keep market shares static, it provided that a carrier which increased its proportionate share through routed traffic had to give up an equivalent amount of unrouted traffic so as to restore overall balance. Conversely, if its share declined, it was to receive additional unrouted traffic. In theory, this mechanism would offset any fluctuations in the market. However, because a carrier is always to receive its routed traffic irrespective of its quota, it is apparent that the balancing provisions would work only so long as conditions in the industry did not deviate significantly from those in the base year. Experience under this formula early indicated, however, that conditions were not static and that the balancing provisions were inadequate to deal with

[12] We have focused here only on the three largest carriers, since the figures indicate that the relative positions of the smaller carriers are affected only slightly by the distribution of unrouted traffic. Under the formula, TRT does not receive unrouted traffic to many of its service points, since they were added after the formula was prescribed. FTC does not receive any unrouted traffic at all. US-Liberia receives unrouted traffic to Liberia which is its only service point. Consequently, the unrouted traffic volumes of these carriers are too small to affect significantly the overall industry traffic statistics.

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the dynamics of the industry. The IRCs expanded their gateway operations, and self-generated traffic (by definition specifically routed) became a more important part of total traffic than it was during the base year. The rapid increase in gateway-originated traffic upset the delicate balance needed for the formula operation and caused a proportionate decline in the relative amount of unrouted traffic available to redress imbalances. This led to the emergence of the "overages" and "deficiencies" which have plagued formula administration since its inception and led to the effective demise of the proportionate distribution system.

21. An overage occurs when a carrier exceeds its quota solely through routed traffic. A deficiency occurs when a carrier receives insufficient routed traffic to satisfy its quota. Since a customer routing is inviolable, it is obvious that giving up unrouted traffic would not bring a carrier with an overage back to its quota. Conversely, unless routed traffic were taken away from such a carrier, the unrouted traffic pool would be insufficient to restore a deficient carrier to its quota. To deal with this dilemna, the IQB adopted two policies which it hoped would restore the overall balance. First, over the objections of ITT, the IQB set an overage (or deficiency) in a carrier's gateway quota for traffic to a particular subarea against a deficiency (or overage) in its hinterland quota for the same destination. Second, if this failed to restore balance, the IQB accumulated the resulting net overage or deficiency from year to year. This was apparently done in the hope that, over time, the imbalances would cancel each other. In practice, however, this resulted only in the accumulation of ever higher imbalances. The pleadings of the parties allege that at present RCA has accumulated deficiencies of $49.8 million while ITT has accumulated overages of $24.6 million and WUI overages of $24.8 million. From the history of formula operations it appears that absent an unforeseen change in market conditions, these imbalances will never correct themselves.

22. We find the accumulation of large overages and deficiencies as evidence that the formula failed to keep market shares static. As such, we do not accord them any independent legal significance. They are merely bookkeeping entries which document the shift in filing traffic from WU to IRC public offices. This is not to say, however, that these imbalances are without importance. They have played a key role in bringing about the distortions in the present distribution we noted above. It is one of the ironies of the formula that a deficiency, which on the surface appears to be a detriment, is in reality a benefit; while an overage is a detriment. RCA has accumulated substantial deficiencies during the operation of the formula; but the result has been not a decline in its relative market share. Rather, its overall share has increased due to the unrouted traffic it receives under the formula. RCA receives this traffic largely because of its accumulated deficiencies. ITT, on the other hand, has accumulated large overages overall and, consequently, receives little unrouted traffic. As deficiencies and overages appeared, the formula provided that the distribution be altered periodically to increase or decrease, respectively, a carrier's share of unrouted traffic. As this process continued, the ultimate effect was that the carrier with the largest deficiency eventually came to receive all unrouted traffic to a given destination.

23. In its Supplemental Comments, WUI claimed that ITT's arguments concerning the formula's disincentive to competition were fallacious. ITT had argued that the balancing provisions discourage carriers from seeking to improve service. WUI, however, noted that only 226,674 messages out of a total outbound volume of 1,938,828 messages or 11.7%[13] are presently subject to the balancing provisions. Therefore, WUI argued that, the small volume subject to proportionate distribution, it is unrealistic to assume that service quality could be negatively affected by the possibility of lost unrouted traffic. This argument, while reasonable on its face, ignores the fact that the reason little traffic is subject to proportionate distribution is that for most destinations one carrier receives all unrouted traffic. However, at its inception, the formula was designed to preserve proportionate distribution to most, if not all, destinations. Thus, all WUI's figures really show is that distribution under the formula has become distorted.

24. In this connection, however, we wish to note that we are not concerned here whether or not a party can quantify negative impact of the formula. ITT did not claim that the formula has led to an impairment of service quality. At most, it argued that the disincentive discouraged improvements in quality. This is precisely what concerns us about the present pattern of distribution. We cannot ignore the possibility that quality of service could have been improved absent the inequities of the formula. In any event, by placing distribution of traffic on a rational and competitive basis, we can minimize this danger and maximize the possibility of future benefits. For this reason, we believe the distortions in distribution patterns in the present formula are injurious to the public interest and should be eliminated.

25. Besides the general problems which apply equally to all carriers, there are certain special formula provisions which confer benefits on particular carriers to the detriment of the others. These matters are Schedule B, Appendix 1, and the designation of WU offices as WUI public offices.

26. *Schedule B of the Formula.* This refers to an arbitrary compromise agreement between WU and RCA which while part of the formula, operates outside the quota system. Under this agreement, in addition to its own quotas under the formula, RCA receives a substantial extra block of traffic taken from WUI's quotas destined to certain subareas of Area A (Atlantic). This agreement derives from an earlier (1931) exchange-of-traffic contract between WU and RCA under

[13] WUI based its calculations on the results of the WU study and IQB figures. It took the total number of messages reported during the study period for nonexclusive destinations and compared them with the total volume reported for all destinations. These figures are broken down as follows:

Carrier	World
ITT	94,080
RCA	78,414
TRT	2,200
WUI	52,380
Other	0
Total	226,674

International Record Car

...ich RCA transferred to WU all ...ited States points beyond New Y... ...d Boston (where RCA operated its ...m to transfer to RCA all outbou... ...ceived from WU two outbound m... ...ssages it transferred to WU. Thi... ...mpensate RCA for the fact that it ...re inbound messages than it recei... ...7. As we noted in our 1943 prescr... ...hedule B was intended to redres... ...CA suffered with respect to WU sin... ...y international carrier without sig... ...rket. However, whatever validity ... ...mulgated, we can see no justific... ...resent conditions. While the provisi... ...me of traffic any other carrier re... ...n comes from WUI's quotas, we b... ...fect on those carriers which is agg... ...change agreements with most fore... ...e basis of proportionate return. Pro... ...nciple under which an entity carryin... ...bound traffic from that country in ... ...d the inbound traffic. Since there ar... ...the points affected by Schedule B ...th RCA for return traffic from tho... ...ves an undue benefit from Schedule ... ...ore importantly, we cannot find an... ...rovisions of Schedule B. There is not... ...es that Schedule B is likely to lead ... ...es; and, since we believe special tr... ...blic interest, we find that Schedule B ...w method of distribution.

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or nonexclusive destinations and compared
. These figures are broken down as follows:

World
94,080
78,414
2,200
52,380
0
226,674

which RCA transferred to WU all its inbound traffic destined to United States points beyond New York, Washington, San Francisco and Boston (where RCA operated its own offices). WU agreed in return to transfer to RCA all outbound traffic so that, overall, RCA received from WU two outbound messages for every nine inbound messages it transferred to WU. This arrangement was designed to compensate RCA for the fact that it transferred to WU substantially more inbound messages than it received outbound messages.[14]

27. As we noted in our 1943 prescription order, *see* 10 FCC at 190, Schedule B was intended to redress the competitive disadvantage RCA suffered with respect to WU since, before the merger, it was the only international carrier without significant access to the hinterland market. However, whatever validity Schedule B may have had when promulgated, we can see no justification for its continuance under present conditions. While the provision does not directly affect the volume of traffic any other carrier receives, since the traffic in question comes from WUI's quotas, we believe that there is an indirect effect on those carriers which is against the public interest. Traffic exchange agreements with most foreign administrations operate on the basis of proportionate return. Proportionate return refers to the principle under which an entity carrying traffic into a country receives outbound traffic from that country in the same proportion as it handled the inbound traffic. Since there are competing circuits to virtually all the points affected by Schedule B, other carriers are competing with RCA for return traffic from those points. Therefore, RCA receives an undue benefit from Schedule B with respect to return traffic. More importantly, we cannot find any benefit to the public in the provisions of Schedule B. There is nothing in the record which indicates that Schedule B is likely to lead to improved service or lower rates; and, since we believe special treatment inconsistent with the public interest, we find that Schedule B should be eliminated from any new method of distribution.

28. After 30 years, we believe that any equities which justified granting RCA this special treatment have been extinguished. Since divestment, all the IRCs have equal access to WU's domestic landlines and all engage in substantial gateway operations. Conversely, WU has no better relationship with one carrier than another. With respect to any pre-merger benefits WU may have enjoyed, the benefits RCA has received under Schedule B since 1943 and WU's withdrawal from international message operations have adequately compensated RCA. The only other justification offered for the provisions of Schedule B—promotion of use of direct circuits wherever possible—has similarly been extinguished by changed circumstances. Today, since all IRCs operate both cable and satellite facilities, the putative advantage in RCA's being a radio carrier has disappeared. RCA is a strong competitor in the international message service and does not need special protection. It is in a position to compete with the other carriers for traffic on an equal footing. Therefore, we believe that Schedule B is inconsistent with the public interest in efficient communication service

[14] Since WU did not operate in Area C (Pacific), traffic destined to points in that Area were not covered by the 1931 contract, nor by the later Schedule B.

and should be eliminated from the new formula we are prescribing herein.

29. We do not agree with RCA that because Schedule B is a contract which is presently effective, we must recognize its rights thereunder in an amended distribution. Section 222(e)(3) provides that a new distribution must "be, so far as is consistent with the public interest, in accordance with the existing contractual rights of the carriers." 47 U.S.C. § 222(e)(3) (1971). The Act by its terms does not require us to recognize existing contracts which we find to be contrary to the public interest. Schedule B is merely another part of the formula and subject to our review in the same way, and under the same standards, as any other part. The fact that RCA denominates it a contract does not alter its status in this proceeding. The present formula as a whole is the result of an agreement of the parties in which each gave up certain rights and gained others and can, therefore, be said to constitute a contract between them. To characterize Schedule B, and by extension the whole formula, as RCA advocates would render Section 222(e)(3) meaningless, since a new formula would necessarily be inconsistent with "existing contractual rights of the carriers" and could never be changed. We do not believe Congress intended such an absurd result. Rather, to give effect to the apparent intent of Congress, Section 222(e)(3) must be regarded both as a protection for individual carriers, by requiring us to consider certain of their contractual rights in any amended formula, and as a delegation of authority to us to review those contracts in the public interest.

30. We also note that Schedule B was not in existence before the merger and only became effective upon our prescription of the formula. As we have said, it is an arbitrary compromise and amounts to a reformation of, and replacement for, the 1931 WU/RCA traffic exchange contract. Thus, even if the contract language covers WU's prior contracts, it would not apply to Schedule B, since RCA chose to negotiate a new arrangement with WU to govern their relations after the merger rather than to rely on the protections afforded by the statute. Therefore, RCA cannot now rely on that provision to thwart amendment of the formula.

31. We also regard Section 222(e)(3) as conferring upon us specific power to review contracts between the carriers and to determine whether they continue to serve the public interest. Unlike development of the original formula, amendment does not depend, even in the first instance, upon agreement of the carriers. Any party can invoke our jurisdiction to this end, or we can proceed on our own motion. Therefore, even where a provision takes the form of a "contract" between the parties, the express language of the statute requires that it serve the public interest. Where, as here, we find the provision inconsistent with that interest, Congress gave us in Section 222(e)(3) the power to prescribe a new distribution without regard to its provisions.

32. *Appendix One.* The concerns expressed above with respect to Schedule B apply equally to Appendix One to the formula. This provision sets forth a special arrangement respecting CNR and CPL and their handling of certain United States-originated traffic, pursuant to pre-merger contracts with Postal. Under this provision, CNR receives traffic to any point routed by the sender over cable facilities which

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transit Canada. In addition to such routed traffic, CPL also receives sufficient unrouted traffic destined to points in Areas B and C (i.e., the West Indies and Australasia) so that its proportionate share of such traffic before the merger would be maintained. This arrangement was designed to recognize CPL's rights under exchange-of-traffic contracts it had concluded with Postal and which were still in effect at the time of the merger. CPL stated that it believes it is entitled to receive traffic under this provision by virtue of the pre-merger contract and argues that the new formula should recognize those rights. CNR, however, has indicated it no longer wishes to participate in traffic distributed under this provision since it states that the revenues it receives thereunder are not sufficient to justify its continued participation in the costs of administering the formula. In view of our action herein, we will grant CNR's request to withdraw.

33. We believe that this special arrangement also should be terminated. The original justification for the provision was that the only direct cables serving the affected points landed in Canada. Accordingly, we acquiesced to the arrangement to respect a customer's choice to route his message via cable; even though that required intermediate relays and created a greater potential for delay, which could have been avoided by use of then-available direct radio circuits. The fact that we were then engaged in World War II was an important consideration in our approval of this arrangement. The availability of alternate routing through Canada for messages to Australasia was considered important to the war effort. *See* 10 FCC at 193. After the war ended, however, that consideration ceased to be a major factor. Moreover, today those points are served by cable and satellite facilities directly from the United States. Therefore, any operational justification for this circuitous routing has disappeared. In this situation, we believe that the public interest will be better served by placing all carriers on an equal footing with respect to this traffic. Traffic arbitrarily awarded under Appendix One could otherwise go to other carriers who have no less claim to it than the Canadian carriers. Therefore, we conclude that Appendix One disserves the public interest. Accordingly, we shall eliminate the arrangement from the new formula.

34. As we have noted, Appendix One was designed to recognize rights under CNR's prior contract with WU and CPL's prior contract with Postal. Therefore, under our analysis, this arrangement, at least insofar as it relates to CPL, is the type of contract Section 222(e)(3) was designed to protect. However, Appendix One, like Schedule B, is a reformation of those prior contracts. Appendix One provides by its own terms that, in the case of any conflict between its provisions and the prior contracts, Appendix One shall control. Accordingly, CNR and CPL must also be considered to have foregone the protections of Section 222(e)(1) and 222(e)(3). In any event, Section 222(e)(3) expressly gives us the power to review Appendix One in this proceeding and, since we find it inconsistent with the public interest, to abrogate it in a new method of distribution.

35. Our action herein does not deprive either CNR or CPL of their rights to exchange traffic with WU to any point. These carriers will continue to receive all traffic specifically routed by the sender via their facilities. Further, to the extent that they handle routed traffic to any

point, they will qualify under the interim formula for their proportionate share of unrouted traffic. It is only with respect to unrouted traffic which was distributed on an arbitrary basis that our action has any effect. Thus, CNR and CPL are placed on the same basis as all other carriers and can compete with them for all traffic they receive. In this way, we believe that unrouted traffic may be distributed equitably, without undue benefit to any party.

36. As is apparent from our discussion of the interim formula, the right to receive traffic carries with it a consequent responsibility to share in the costs of distribution under it. With respect to CNR, we will grant its request to withdraw from participation in the distribution of traffic under the interim formula, unless and until, it notifies us that it wishes again to participate. Until such time, any traffic specifically routed via CNR will be considered unrouted for purposes of the interim formula. With respect to CPL, we will assume, unless otherwise notified, that it wishes to continue to participate in the distribution under the conditions we have set forth herein.

37. *WU/WUI Public Offices.* Under the 1963 amendments to the formula, we added a provision which permitted certain WU (domestic) public offices in New York, Washington and San Francisco [15] to be designated as WUI public offices, so that messages filed in those offices are automatically considered as specifically-routed via WUI. This was done to spare WUI the expense of establishing its own public offices so that it could compete strongly with the established IRCs. ITT and TRT have challenged this provision as unduly favorable to WUI since it thereby continues to be spared the expense of maintaining public offices which the other IRCs must incur. Further, ITT believes this arrangement, due to the similarity between the respective names of the two companies, also fosters confusion among the using public (and some WU employees) as to the routing of international messages. ITT asserts that WUI is now a viable, aggressive competitor and should be required to open its own public offices. In response, WUI denies that it receives an undue advantage from this arrangement. WUI notes that ITT and RCA have more offices (14 for RCA and 10 for ITT) in New York than the three WU/WUI offices (each carrier has one office in Washington and one in San Francisco) and that WUI is barred from opening its own offices by its agreement with WU. Further, WUI asserts that it must pay WU's landline haul charges for each message it receives through these offices, while the other IRCs do not pay WU for messages filed at their public offices.

38. We are not concerned precisely with the question whether WUI achieves a quantifiable competitive advantage by the arrangement. Whether or not the money WUI saves by not operating its own public offices is offset by the additional landline haul it pays to WU (although we are inclined to believe that it is not), the use of WU public offices as WUI offices is inconsistent with our new policies. The present ar-

[15] Specifically, the formula designates as WUI offices (1) all WU public offices south of 60th Street in the Borough of Manhattan, New York (at present there are three), (2) the main and one branch WU office in Washington (at present there is only one designated office), and (3) the main and one branch WU office in San Francisco (now, only one office). WU Cables did not serve Pacific Points, so there was no WU "gateway" in San Francisco as such. However, WU transferred Pacific-destined traffic to RCA in San Francisco. To allow WUI to begin operations on an equal footing with the other IRCs, we granted its request for a San Francisco gateway as part of the divestment proceeding. *See* 30 FCC 323, 371-82 (1961).

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[16] Western Union Divestment, 30 FCC 323, 382 (19
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FCC 293, 317 (1950).

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rangement was a carefully-drawn compromise which was intended to preserve each carrier's pre-divestment traffic shares in New York while not depriving WUI of former WU Cables traffic or forcing it into early outlays of cash for new offices of its own. *See* 30 FCC at 377-9. However, we specifically left open the question of future developments without opinion. [16] During the past 14 years, WUI has become a viable carrier and no longer needs special arrangements to protect its position. We are not persuaded by WUI's argument that it is blocked by its contract with WU from opening its own offices. In connection with its counter proposals, discussed above at paragraph 12, WUI Supplemental Comments at p. 8. We find it peculiar that in the one case WUI argues that it is legally unable to open offices; but under the other, it sees no such impediment. We are of the opinion that WUI is under no legal disability with respect to opening its own offices.

39. In reconsidering our approval of the WU divestment, 30 FCC 951 (1961) we stated that

> so long as [WUI] desires to use the facilities of Western Union and have unrouted traffic filed at designated offices of that company considered specifically routed via [WUI], it should not be permitted to open additional competing offices of its own in the gateway cities. 30 FCC at 958.

We are not here talking about opening additional offices; but of replacing the designated WU offices entirely with its own offices. Therefore, neither our divestment order, nor the formula prevents WUI from following this course.

40. Further, we believe that there is at least one way in which WUI is presently deriving a competitive benefit from this arrangement. We note that in New York and San Francisco, WUI maintains its own network of customer tielines for international telex; and that it is in the process of reterminating its Washington tielines (as well as the intercity lines between Washington and New York) at its own operating center. [17] Telex tielines are direct connections between a customer terminal and the WUI telex switch and are essentially automated. Consequently, they require less human intervention than the manning of a public message counter such as those of the other IRCs. It appears, therefore, that WUI is operating its own competing telex network while relying on WU offices for the more labor-intensive message service. This we believe to be a substantial benefit—particularly since telex customers may also use their tielines to file overseas messages. [18] While this is not a violation of the formula, we believe the policy reasons discussed above for requiring WUI to choose between using WU offices or its own, but not a mixture of both, should apply here equally.

41. As to WUI's contractual obligation to WU, after 15 years we believe it bad policy for private parties to extend further a contract

[16] Western Union Divestment, 30 FCC 323, 382 (1961):
> What will happen in the future will, of course, depend on the competitive efforts and the effectiveness of the carriers. That, however, will be the natural and proper result of operating in a competitive society.

[17] While WUI's tielines presently terminate at WU's Washington office, the concentrator to which they are attached is owned by WUI and maintained by WU pursuant to a contract.

[18] We are concerned by the requirement in the WU/WUI contract that WUI pay WU its specified landline haul charge whether or not WU picks up the message. We believe that WU is not entitled to landline haul charges where it has not performed any functions. *See* All America Cables and Radio, 15 FCC 233, 317 (1950).

which is unnecessary and contrary to the public interest. In view of the small volume of message traffic filed through the designated offices, the impact on WU from the loss of its landline haul charges for this traffic will be minimal and will be outweighed by the benefits of increased competition. We note, however, that WU did not address in its pleadings the question of its contract with WUI. Therefore, we will not make any order respecting the disposition of the WUI public offices at this time. We note that under Section 214(d) of the Act, we have the power to require a carrier to open a public office or offices. While we are not now instituting such proceedings, we are prepared to do so if that becomes necessary. In connection with this matter, we have included in Section IV of the interim formula a provision labeled "special interim provision for WUI" continuing the essentials of the present WU/WUI arrangement. Upon the opening of new WUI offices, we shall amend the formula to remove the interim provision.

III. Summary and Conclusions

A. The Present Formula

42. In determining whether the present distribution meets the statutory standard, Section 222(e)(3) requires us to look both at private interests and at the public interest. It is clear that the various carriers have a legitimate and protected interest in assuring that their share of traffic under the formula be equitably determined. Since the formula governs relations between competitors, it is more difficult to measure its impact on the public. However, we believe that for purposes of this proceeding an appropriate general statement of the public's interest is the statutory requirement that we guarantee residents of the United States a rapid, efficient communications service with adequate facilities and reasonable charges. 47 U.S.C. § 151. We believe the market-sharing features of the present formula are ill-designed to advance this statutory goal. In the early days of international telegraphy, and particularly when cable carriers and radio carriers were separate entities, there was a vigorous competition which benefitted the public in the form of increased service coverage and substantially reduced rates. Today, in services such as telex and leased channel there is still a vigorous competition. The disappearance of radio/cable competition and the institution of the formula significantly blunted, although did not eliminate, competition in message service. The charges for message service have not increased substantially, but there has been no stimulus under the present formula to improve service or increase efficiency. In this situation, we believe that the public is ill served by a formula which stifles user choice.

43. In the designation order, we directed the parties to provide information concerning the effects on them, as well as the public, of any defects in the present formula (issue 3). From the responses to that issue, it is apparent that, like the effect on the public, the effects on the carriers of the matters we considered above are impossible of concrete quantification. The inequities we outlined above did not occur suddenly, but evolved over time and were the result of interacting forces. While this situation renders quantitative determination of the effects on individual carriers and the public exceedingly difficult, if not impossible, we believe the record before us as well as elementary logic

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B. The New Method of Distribution

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clearly warrants the conclusion that both the individual carriers and the public have been harmed by the formula's denying a carrier unrouted traffic. The carriers so affected have seen their marketing efforts essentially nullified by the balancing provisions—ironically, the more successful those efforts have been, the more the carrier has been penalized. The formula's arbitrary disregard of the public's role has thwarted its expectations and may have resulted in an improper allocation of resources. Accordingly, we have concluded that those who have been injured are entitled to relief.

B. The New Method of Distribution

44. In view of the foregoing, we have concluded that the present formula should be repealed. Since the special circumstances which prompted creation of the present formula more than thirty years ago no longer exist, we believe that traffic should be distributed on the basis of customer choice. In this way, the public interest will be best served, since the public will make its own decisions. WU and OT suggested that customers be required to specify the routings. While we agree in principle that we should proceed in this direction, we do not believe that the record presently before us is adequate to adopt this method at this time.

45. Although the parties were not on notice that we would consider a requirement for specific routings, neither the proponents nor the opponents of this method addressed the legal or economic issues raised thereby. Consequently, we are unable at this point to determine the extent of the economic burden which would result from a requirement for specified routings, or the proper sharing of that burden between WU and the IRCs. The results of the WU study show that in 1974 approximately 3.0 million messages or some 35% of all outbound international traffic was unrouted. The study also indicates that a large number of customers either do not care to route their messages or that they are not familiar with the different IRCs, since three-fourths of WU transfers are unrouted. We believe that this is because the IRCs have not effectively sought to reach these users and that this failure may prevent the efficient operation of a customer-routing system at this time.

46. Because of the apparent unfamiliarity of users with the IRCs or their respective merits; required customer routings will require that such users be informed of their choices at the time of filing. For nearly half of all customers who file overseas messages, the only carrier with which they have contact is WU. Therefore, until IRC advertising can become effective, WU employees will be required to provide users with this information. Because of the number of customers involved, we believe this may place a substantial burden on WU. None of the parties considered the increase in WU's costs which would follow from this expanded role, or the effect of that increase on the users of both domestic and international service. To assure that no prejudice will result, we are of the opinion that suitable instructions and operating arrangements, agreeable to all concerned, are needed to guide WU in presenting the public a mandatory choice among IRCs. The information now before us, however, is insufficient to prescribe those instructions or operating arrangements.

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47. To gather the information we need for decision, we will direct the interested parties to address the matters we have discussed above, as well as any matters they choose to raise, concerning the implications of the all-routed approach and the means to implement it in an expeditious and orderly fashion. In the interim, we will prescribe a distribution of outbound traffic on the basis of the formula in the Appendix hereto. While we are considering the carrier responses, the interim formula will provide an equitable means of distribution which will focus on customer selection and give the IRCs a chance to solicit routings. In this way, the eventual role of WU in the informational and operational process will be reduced; as will the potential for unfair advantage to any party from that role. We expect that the IRCs will use this period to expand their solicitation efforts, so that the customer routing system will work smoothly and efficiently. Further, we expect the parties during this period to work out mutually-agreeable procedures for implementation of the all-routed distribution system so that we can avoid later controversy on this point. Should the parties fail to agree on such procedures, however, we stand ready to prescribe them if that becomes necessary.

48. *Interim Formula.* In developing the interim formula, we have sought to eliminate complexities which have made the present formula difficult to administer and a source of controversy. For this reason, the interim formula treats all classes of messages as a whole, rather than individually as at present. For the same reason, we see no need to continue separate gateway and hinterland quotas. Rather, the interim formula recognizes only two categories of traffic—routed and unrouted. WU will continue to distribute specifically-routed traffic to the designated carrier. Unrouted traffic will be distributed pursuant to a simplified quota system for all traffic wherever it originates in the United States. Further, we are discarding the concept of "gross international tolls" as a basis for calculating a carrier's quota. Random distribution of messages as they are filed will, over the long run, insure that each carrier receives a fair share of revenues. We will also delete the balancing provisions, since there is no longer any need for them. This will also eliminate the chief cause of the distortions in the present distribution and prevent the future accumulation of overages and deficiencies. Under the new formula, any short-run imbalances which may occur due to traffic variations will correct themselves over time. One important feature of the interim formula is the provision for adjustment of the carriers' quotas. This will permit distribution to remain closely tied to changing conditions and assure that the present distortions do not recur.

49. Under the interim formula, a carrier is entitled to receive unrouted traffic to all points it is authorized to serve. ITT had proposed that unrouted traffic be distributed on a country-by-country basis among those IRCs authorized direct circuits to each such point. TRT, on the other hand, would base distribution on the points a carrier tariffs, whether served by direct circuit or through interconnection. We believe that ITT's proposal in this regard is not suited to our overall goal. Beyond the problem raised by RCA of defining a "direct circuit" (which ITT does not address). basing distribution solely on direct circuits would leave significant gaps in providing for the handling of traffic. This is because there are numerous destination points

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50. More fundamentally, howeve phy underlying ITT's proposal. IT throughout this proceeding, here se of this proposal would be to deny s significant unrouted traffic, since centage of their service points thr cannot find a justification in the pu in this area. Since all carriers comp ing, the only appropriate criteria ar nation point—since a carrier may t rized to serve—and whether a carri Therefore, eligibility for a quota wi tsts in its tariff as of the release d new service points, it will receive the extent that it handles routed t be updated to keep it in touch with ing adjustments to six-month inter sponsibilities and be spared the ne distribution practices.

51. ITT and TRT also disagree c unrouted traffic to each destinatio ITT proposed that the volume be ca ble carrier's share of WU transfer TRT, on the other hand, argued for c land WU transfers in the belief tha traffic (including direct pickups) fa believe that the volumes should be ever originating in the United Sta direct access, and routed WU transf achieve the goal of distributing unr routed. Direct pickups are by definit sent a significant portion of overall traffic would be unrealistic and cont

52. Looking beyond the features o of some remaining matters starting lieved of distributing traffic among thetic to WU's desire to simplify i should be totally relieved of its respo WU receives significant revenues f international message service, so it ca such traffic. Therefore, we have decli over all traffic to the IQB for dist traffic from the public, it is in the pos distribution. Turning traffic over to an extra level of processing which v and increase distribution costs. The e origin points, etc., outlined above wil rations and decrease its costs. We a eimbursed for the reasonable costs i ut do not believe it should receive

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), basing distribution solely on
gaps in providing for the han-
are numerous destination points

in the world which no carrier serves directly. Under the ITT proposal, there would be no provision for unrouted traffic to these points.

50. More fundamentally, however, we take exception to the philosophy underlying ITT's proposal. ITT, which has advocated competition throughout this proceeding, here seeks to limit competition. The effect of this proposal would be to deny small carriers, such as TRT or FTC, significant unrouted traffic, since those carriers serve a higher percentage of their service points through intermediate connections. We cannot find a justification in the public interest to so limit competition in this area. Since all carriers compete for traffic irrespective of routing, the only appropriate criteria are whether a carrier tariffs a destination point—since a carrier may tariff only those points it is authorized to serve—and whether a carrier handles routed traffic to a point. Therefore, eligibility for a quota will be based on the points each IRC lists in its tariff as of the release date of this order. If a carrier adds new service points, it will receive unrouted traffic to those points to the extent that it handles routed traffic. In this way, distribution can be updated to keep it in touch with changing circumstances. By limiting adjustments to six-month intervals, WU can be certain of its responsibilities and be spared the need for too-frequent changes in its distribution practices.

51. ITT and TRT also disagree on how to compute the volume of unrouted traffic to each destination an eligible carrier is to receive. ITT proposed that the volume be calculated on the basis of each eligible carrier's share of WU transfer traffic (gateway and hinterland). TRT, on the other hand, argued for distribution based solely on hinterland WU transfers in the belief that inclusion of gateway-originated traffic (including direct pickups) favors the New York carriers. We believe that the volumes should be based on *all* routed traffic, wherever originating in the United States. This includes direct pickups, direct access, and routed WU transfers. This is the most likely way to achieve the goal of distributing unrouted traffic on the same basis as routed. Direct pickups are by definition specifically routed and represent a significant portion of overall traffic. Therefore, to ignore such traffic would be unrealistic and contrary to our overall policy herein.

52. Looking beyond the features of the new formula, we will dispose of some remaining matters starting with WU's request that it be relieved of distributing traffic among the IRCs. While we are sympathetic to WU's desire to simplify its role, we cannot agree that it should be totally relieved of its responsibilities under the new formula. WU receives significant revenues from its participation in through international message service, so it cannot say that it has no interest in such traffic. Therefore, we have declined to accept its proposal to turn over all traffic to the IQB for distribution. Since WU receives the traffic from the public, it is in the position most expeditiously to effect distribution. Turning traffic over to the IQB would merely introduce an extra level of processing which would increase the risk of delays and increase distribution costs. The elimination of multiple categories, origin points, etc., outlined above will allow WU to streamline its operations and decrease its costs. We agree with WU that it should be reimbursed for the reasonable costs it incurs in effecting distribution; but do not believe it should receive a profit for its function. As we

have noted, WU receives payment for its landline haul; we see no reason for it to receive a second payment from formula administration for the same traffic—beyond its out-of-pocket expenses. We anticipate that IRC solicitation of international traffic under the new formula will reduce the amount of unrouted traffic that WU must handle. Thus, its function will be further simplified as that process occurs. Finally, we see no reason why WU cannot automate the handling of traffic under the new formula if it believes that will be in its interest. Accordingly, we will continue to require WU to make the distribution of traffic under the new formula.

53. *Accumulated Overages and Deficiencies.* We turn now to a matter of particular contention among the parties—the disposition of the accumulated deficiencies and overages. RCA asserts that legally and as a matter of equity it must be compensated for its deficiencies. As we indicated above, however, we agree with the other parties that these are no more than statistical records which indicate the structural weakness of the present formula. RCA does not state why it believes that deficiencies represent a legal obligation in which it has a vested interest. Neither Section 222, nor the formula itself, directs the accumulation of deficiencies or overages. In our order prescribing the formula we did not consider the question. RCA appears to be asserting that its quotas give it a claim to a guaranteed amount of traffic. The present formula does not guarantee any carrier that it will receive traffic. As more customers routed messages and the unrouted pool shrank, traffic available for distribution became inadequate to satisfy quotas. Such changes in the marketplace can hardly be said to have wronged RCA—particularly since its own increase in self-generated traffic and the benefits it received under Schedule B contributed to this process. Similarly without merit is RCA's contention that it has an equitable claim to compensation because it complied with the formula in good faith. The present formula is a legal obligation on the parties and compliance with its provisions is mandatory. Accordingly, we believe that the accumulated overages and deficiencies should be cancelled, without compensation, and that distribution under the new formula should be made without reference thereto.

54. *Administration.* The simplest method for handling the day-to-day administration of the interim formula will be to continue to rely on the IFC and the IQB. However, if the IFC is satisfactorily to perform its functions with respect to the interim formula, all interested carriers must be equally represented on it. Presently, FTC and CPL have no representation on the IFC. Since those carriers have an interest in the interim formula they should be represented. Accordingly, we will expect that upon application FTC and CPL will be admitted to the Committee with the full rights and responsibilities of membership, including participation in the costs of the Committee and its functions.

55. As mentioned above, ITT presently has four votes on the IFC and RCA has two, while all others have one each. This situation resulted from the fact that these companies owned constituents which operated in different areas, employed different media, or provided different services. We must now recognize that those entities either no longer exist (having been merged into one company) or are under common ownership. To make the IFC a viable tool for supervising the

interim formula's operations, we
that all interested members hav
response to WUI's proposal in t
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We believe that we can legally ac
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56. The interim formula shall b
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WU 13-week study and the infor
proceeding.[20] Inasmuch as no pa
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figures will then be totaled for e
figures compared to that total. The
carrier's share of routed traffic fo
fore, its quota of unrouted traffic
point. For purposes of these calc
applicable destinations as shown in
then begin distributing unrouted tr
ages on February 1, 1976.

C. Canadian, Mexican, Newfoundla

57. There is an additional matter
this proceeding, we believe appropri
the Act, requires a separate form
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Pierre-Miquelon are considered dom
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prescribed by us, 10 FCC 184, 193
separate formula was developed als
riginal request, ITT did not raise,

[19] A companion proceeding in this docket was insti
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mission and Order in this proceeding, 55 FCC 2d 9
ket, 55 FCC 2d 382 (1975) (Docket No. 19660), we a
of a settlement agreement entered into by the part
interate messages were increased from 6.5 per wo
creases for lower classes of service). Our order a
constituting the new divisions. Our action herein doe
a designation to Schedule A to reflect the fact that t

[20] As noted, FTC and US-Liberia did not provid
records during the study period. Therefore, we will
1976, with the other IRCs, the IQB, and the Com
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ts landline haul; we see no from formula administration cket expenses. We anticipate ffic under the new formula that WU must handle. Thus, that process occurs. Finally, nate the handling of traffic ill be in its interest. Accord- to make the distribution of

cies. We turn now to a mat- rties—the disposition of the CA asserts that legally and sated for its deficiencies. As with the other parties that which indicate the structural oes not state why it believes tion in which it has a vested mula itself, directs the accu- ur order prescribing the for- RCA appears to be asserting nteed amount of traffic. The carrier that it will receive sages and the unrouted pool became inadequate to satisfy e can hardly be said to have n increase in self-generated er Schedule B contributed to CA's contention that it has an it complied with the formula egal obligation on the parties ndatory. Accordingly, we be- l deficiencies should be can- stribution under the new for- thereto.

hod for handling the day-to- will be to continue to rely on C is satisfactorily to perform ormula, all interested carriers ently, FTC and CPL have no rriers have an interest in the ted. Accordingly, we will ex- will be admitted to the Com- ilities of membership, includ- mittee and its functions.

ly has four votes on the IFC e one each. This situation re- ies owned constituents which different media, or provided e that those entities either no one company) or are under viable tool for supervising the interim formula's operations, we believe that we should recast it so that all interested members have one vote each. The parties in their response to WUI's proposal in this regard indicated no opposition to equalization. Under Section 222(e)(3), we have the power to repeal the present formula, which would terminate the IFC, and to prescribe a new formula and create a new committee with equal representation. We believe that we can legally accomplish the same result by restructuring the present committee. As before, all costs incurred by the IFC in administering the interim formula shall be borne by the members in the proportions they receive traffic under it.[19]

56. The interim formula shall become effective on February 1, 1976. The initial quotas shall be determined by the IQB on the basis of the WU 13-week study and the information supplied by the IRCs in this proceeding.[20] Inasmuch as no party has raised any objection to this information, and all have agreed to its use, we believe it will represent an equitable basis on which the IQB can make the necessary calculations and issue the appropriate distribution instructions to WU. The IQB shall calculate the initial quotas of unrouted traffic for each country of destination by determining from the above information the number of routed messages (as defined in Section IV of the interim formula) to such destination handled by each IRC. The individual carrier figures will then be totaled for each destination and each carrier's figures compared to that total. The resulting ratios will represent each carrier's share of routed traffic for each destination point and, therefore, its quota of unrouted traffic under the interim formula to that point. For purposes of these calculations, the IQB will employ the applicable destinations as shown in the WU 13-week study. WU will then begin distributing unrouted traffic on the basis of these percentages on February 1, 1976.

C. Canadian, Mexican, Newfoundland Formulas

57. There is an additional matter which, while not directly in issue in this proceeding, we believe appropriate to address. Section 222(e)(2) of the Act, requires a separate formula to govern distribution of outbound message traffic to Canada and Mexico. This was done to reflect the fact that under Section 222 Canada, Mexico, Newfoundland, and St. Pierre-Miquelon are considered domestic points. Pursuant to this requirement, formula for Canada and Mexico were agreed upon and prescribed by us, 10 FCC 184, 193-4 (1943). In addition to these, a separate formula was developed also for Newfoundland traffic. In its original request, ITT did not raise, and the respondents did not ad-

[19] A companion proceeding in this docket was instituted to consider a request by WU for increased payments for its domestic handling of overseas message telegrams (landline haul). By Memorandum Opinion and Order in this proceeding, 55 FCC 2d 96, *reconsideration granted in part and denied in part*, 55 FCC 2d 382 (1975) (Docket No. 19660), we approved as a basis for terminating that proceeding a settlement agreement entered into by the parties under which WU's landline haul divisions for full-rate messages were increased from 6.5 per word to 9.5 per word (with corresponding lesser increases for lower classes of service). Our order amended Schedule C of the present formula by substituting the new divisions. Our action herein does not affect this provision other than to change its designation to Schedule A to reflect the fact that the two preceding schedules have been replaced.

[20] As noted, FTC and US-Liberia did not provide information concerning their direct gateway pickups during the study period. Therefore, we will direct each of these carriers to file by January 10, 1976, with the other IRCs, the IQB, and the Commission data on all traffic it picked up directly during the period December, 1974 through March, 1975. These responses shall be presented in the same format as that in the WU 13-week study and in the other IRC reports.

dress, the question whether any change in these formulas is needed. However, we have decided to review these matters on our own motion.

58. The Canadian, Mexican and Newfoundland formulas do not present the same questions of arbitrary market division or special benefits we have examined above in connection with the international formula. The Canadian formula, for example, was designed primarily to preserve, after merger, CPL's rights under its prior exchange-of-traffic contracts with Postal. (WU had exchanged traffic with CNR). The formula contained no cumbersome quota system and provided for periodic adjustment to keep its provisions in touch with developing circumstances. However, it now appears to us that this formula is unnecessary, since it appears that CNR and CPL no longer provide duplicating services. This being the case, there would be no opportunity or desire on the part of WU to discriminate between the two carriers. Therefore, we will repeal the Canadian formula.

59. It appears that a formula for Newfoundland traffic has similarly become unnecessary. The original reason for a separate formula for this point was to preserve to Commercial Cable Company (one of the predecessors and constituents of ITT) the pre-merger traffic which it handled to Newfoundland over its transatlantic cable and to preserve CPL's rights under its Postal contracts. Since then, however, that cable has been taken out of service and CPL no longer serves Newfoundland. Therefore, there appears no longer to be a need for this provision. Accordingly, we will repeal this provision as well.

60. The Mexican formula also appears to be unnecessary. The purpose of the formula was to accommodate two then-existing factors. First, WU turned over Mexico-bound traffic both to the Mexican administration and to the Mexican Telegraph Company. This latter company, a joint venture of WU and an ITT predecessor, operated both within Mexico and between Mexico and the United States. It was felt necessary to provide for dividing traffic between the two entities providing service to Mexico. However, the Mexican government nationalized the Mexican Telegraph Company in 1949 and has unified all telegraph operations in one entity. WU today turns all unrouted traffic over to that entity. Second, prior to the merger, TRT and RCA also operated circuits to Mexico (connecting with the Mexican government lines). The Mexican formula preserved these operations after the merger and directed WU to turn over all traffic specifically routed via these carriers. We believe there is no need to continue a separate arrangement for Mexico. Rather, we will require WU to continue honoring RCA and TRT specific routings. All unrouted traffic will be turned over to the Mexican entity. We wish to emphasize, however, that our action does not relieve WU of its obligation to treat all carriers in an equitable and non-discriminatory manner in distribution of outbound traffic.

D. Maritime Formula

61. Comsat General has asserted that the present formula under which telegraph traffic between points in the United States and ships at sea is presently distributed will not be suitable upon introduction of

maritime satellite facilities; and
initiated to consider the need for
well as specific proposals for su
original petition did not address
inquiry herein was limited to the
messages. *See* 43 FCC 2d 1174.
directed to address the merits of
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formula is based on a quota syst
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situation, we agree with the partic
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that this should be done in a separ
by separate order direct all interes
continued reasonableness of the m

62. In summary, we have concl
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relying primarily on consumer ch
among the several international re
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implications, we will not prescribe t
fic must be specifically routed by t
we shall prescribe a formula which
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thus rewarding the successful comp
as does the present formula—we ex
effort and a consequential reduction
are soliciting prompt comments con
and legal implications of an all-rou
may reach an early decision concer
would be served even better throug

63. Accordingly, IT IS ORDERE
201, 222(e)(1), 222 (e)(3) and 403 of t
amended, that the formula prescribe
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Western Union Telegraph Company
carriers of outbound, unrouted inter
and all prior amendments thereof, is
2) hereby REPEALED, effective M

64. IT IS FURTHER ORDERE
201, 222(e)(3) and 403 of the Commu
the formula inquiry are directed to fi
file, on or before March 26, 1976, com
operational implications of distributi
telegraph traffic on the basis of req
means by which transition to such a
replies to the above comments may be

nge in these formulas is needed. these matters on our own motion. wfoundland formulas do not pre- market division or special bene- ection with the international for- mple, was designed primarily to under its prior exchange-of-traf- xchanged traffic with CNR). The ota system and provided for pe- ons in touch with developing cir- s to us that this formula is unnec- R and CPL no longer provide ase, there would be no opportuni- scriminate between the two carri- anadian formula.

Newfoundland traffic has similarly eason for a separate formula for ercial Cable Company (one of the T) the pre-merger traffic which it ransatlantic cable and to preserve racts. Since then, however, that and CPL no longer serves New- no longer to be a need for this al this provision as well.

ears to be unnecessary. The pur- nodate two then-existing factors. d traffic both to the Mexican ad- egraph Company. This latter com- n ITT predecessor, operated both and the United States. It was felt affic between the two entities pro- the Mexican government national- y in 1949 and has unified all tele- U today turns all unrouted traffic o the merger, TRT and RCA also ing with the Mexican government erved these operations after the er all traffic specifically routed via s no need to continue a separate e will require WU to continue hon- ings. All unrouted traffic will be We wish to emphasize, however, of its obligation to treat all carri- inatory manner in distribution of

d that the present formula unde- ints in the United States and ships not be suitable upon introduction of

maritime satellite facilities; and requests that a separate inquiry be initiated to consider the need for revision of the maritime formula as well as specific proposals for such revision. We note that ITT in its original petition did not address the maritime formula and that the inquiry herein was limited to the formula covering overseas telegraph messages. *See* 43 FCC 2d 1174. Consequently, the parties were not directed to address the merits of the maritime formula. However, we note that, like the formula under consideration, the present maritime formula is based on a quota system tied to market shares in a pre-merger base period (in this case, 1938). Therefore, the objections we have expressed with respect to market-sharing devices in the international formula may apply to the maritime formula as well. In this situation, we agree with the parties who have commented on the subject that it would be appropriate to examine the maritime formula and that this should be done in a separate proceeding. Accordingly, we will by separate order direct all interested persons to file comments on the continued reasonableness of the maritime formula.

62. In summary, we have concluded that the public interest in the provision of international telegraph services will be best served by relying primarily on consumer choice for the distribution of traffic among the several international record carriers. Due to certain unresolved questions concerning possible operational, economic and legal implications, we will not prescribe that all international telegraph traffic must be specifically routed by the customer. As an initial measure, we shall prescribe a formula which distributes unrouted traffic among the carriers in direct proportion to their share of routed traffic. By thus rewarding the successful competitor—rather than penalizing him as does the present formula—we expect a more aggressive marketing effort and a consequential reduction in unrouted traffic. Meanwhile, we are soliciting prompt comments concerning the operational, economic, and legal implications of an all-routed distribution in order that we may reach an early decision concerning whether the public interest would be served even better through this means.

63. Accordingly, IT IS ORDERED, Pursuant to Sections 1, 4(i), 4(j), 201, 222(e)(1), 222 (e)(3) and 403 of the Communications Act of 1934, as amended, that the formula prescribed by the Commission in 1943 pursuant to 47 U.S.C. § 222(e)(1) (1971) governing distribution by The Western Union Telegraph Company among the international record carriers of outbound, unrouted international message telegraph traffic, and all prior amendments thereof, is (with the exception of Appendix 2) hereby REPEALED, effective March 1, 1976;

64. IT IS FURTHER ORDERED, Pursuant to Sections 4(i), 4(j), 201, 222(e)(3) and 403 of the Communications Act, that the parties to the formula inquiry are directed to file, and any interested person may file, on or before March 26, 1976, comments on the legal, economic and operational implications of distributing outbound, unrouted message telegraph traffic on the basis of required customer routings and the means by which transition to such a method may be efficiently made; replies to the above comments may be filed on or before April 23, 1976;

01147

65. IT IS FURTHER ORDERED, That the interim formula set forth in the Appendix hereto is hereby PRESCRIBED as the formula for distribution of such outbound traffic and shall be followed from March 1, 1976 until further order of the Commission;

66. IT IS FURTHER ORDERED, That distribution of traffic under the interim formula prescribed herein shall be based initially on the respective international record carriers' shares of such traffic derived from the information supplied by the carriers in this proceeding and the results of the study of outbound traffic conducted by The Western Union Telegraph Company; in this connection, French Telegraph Cable Company and United States-Liberia Radio Corporation shall file with the Commission and the International Formula Committee/International Quota Bureau on or before January 20, 1976, the number of outbound international telegraph messages picked up by them directly during the period of the Western Union study, broken down by destination according to the format used in that study;

67. IT IS FURTHER ORDERED, That the formulas prescribed by the Commission in 1943 pursuant to 47 U.S.C. § 222(e)(2) governing distribution of outbound, unrouted message telegraph traffic between the United States and Canada, Newfoundland, and Mexico, respectively, are hereby REPEALED: The Western Union Telegraph Company shall distribute such traffic in a fair and non-discriminatory manner which will, to the extent possible, honor the choice of the customer in designating the carrier to which such traffic is to be transferred; and

68. IT IS FURTHER ORDERED, That the requests of RCA Global Communications, Inc. and Western Union International, Inc. for the convening of oral evidentiary hearings in this proceeding are hereby DENIED.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

APPENDIX

Formula, Pursuant to Section 222(e)(1) of the Communications Act, for the Distribution of Outbound International Message Telegraph Traffic Handled by the Western Union Telegraph Company, As Amended through December 22, 1975.

This formula, pursuant to Section 222(e)(1) of the Communications Act of 1934, as amended, provides the method for distribution by The Western Union Telegraph Company (hereinafter referred to as Western Union) among international telegraph carriers of outbound international message telegraph traffic handled by it within the Continental United States, as that term is defined in Section 222(a)(10) of the Communications Act. The traffic for which distribution is provided herein is all message telegraph traffic by wire or radio, specifically routed or unrouted, handled by Western Union originating in the continental United States, provided, however, that quotas established in Section V hereof shall not apply to the non-message or measured services offered by the carriers, nor to marine (shore to ship) traffic handled by Western Union with respect to the distribution of which a separate formula is annexed hereto as Schedule B.

II. Interested Carriers

The international carriers interested in the distribution of traffic provided for in this formula will be the following (unless and until other international carriers enter business):

Canadian Pacific, Ltd.
French Telegraph Cable Company
ITT World Communications, Inc.
RCA Global Communications, Inc.
TRT Telecommunications Corp.
U.S.-Liberia Radio Corp.
Western Union International, Inc.

In general, an international carrier is inter
for herein whenever it handles routed traff
set forth in Section V, below.

III. Specifically-Routed Traffic

The right to receive a quota under this for
never to limit or to restrict a carrier's sco
always be entitled to receive its specifically
accepts such traffic in pursuance of its publ
joint.

IV. Categories of Messages

For purposes of calculating the quotas spe
classes of traffic shall be considered in the a
of message telegraph traffic.

Notwithstanding any provision in this form
international carriers shall respect specific r
shall transfer to another carrier any message
All international messages delivered by We
agreed upon "via" of the international carrier
Union. Messages shall not be considered sp
particular carrier's telegraph blank. For purp
a message shall be considered specifically-ro
following cases:

(a) Where messages are filed at an office e
international carrier, whether filed in person
over a tieline or other directly-connected fac
customer specifically routes such messages vi
ing such office (direct gateway pickup);

(b) Where messages are filed directly wit
gateway office by means of domestic commu
TWX, telephone, or mail, or by messenger
ocurred in connection with the use of such m
messages (direct access);

(c) Where messages are filed with an int
outside that carrier's gateway city by mean
facility terminating in that carrier's gateway
operating and maintaining such facility are b

(d) Where messages are filed with Western
specified in (e) below) or by other means of
tariff, and transferred by Western Union t
Union's landline system, so long as the follow

(i) if, when filed in person, the specific

(ii) if, when filed by messenger, the mes
been previously inserted by the send
cifically routed merely by virtue of t
blank),

(iii) if, when filed by telephone (whethe
office, or to a Western Union Centra

(iv) if, when filed over a tieline or othe
inserted by the receiving clerk at t
routing has been transmitted by the

(e) (*Special interim provision for Western U*
considered specifically-routed via Western
without specific routing via another carri
all offices of Western Union located in the
Manhattan, New York; the main office of W

CERTIFICATE OF SERVICE

I certify that the supplemental brief after remand of petitioner RCA Global Communications, Inc. and the supplemental joint appendix were served on all parties to this proceeding this date by mailing copies, in a sealed wrapper, first-class postage prepaid, to each of the following:

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Jan. 27, 1978

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